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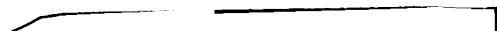
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# REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

District Courts of the United States

WITHIN THE SECOND CIRCUIT.

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BY ROBERT D. BENEDICT.

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VOLUME I.

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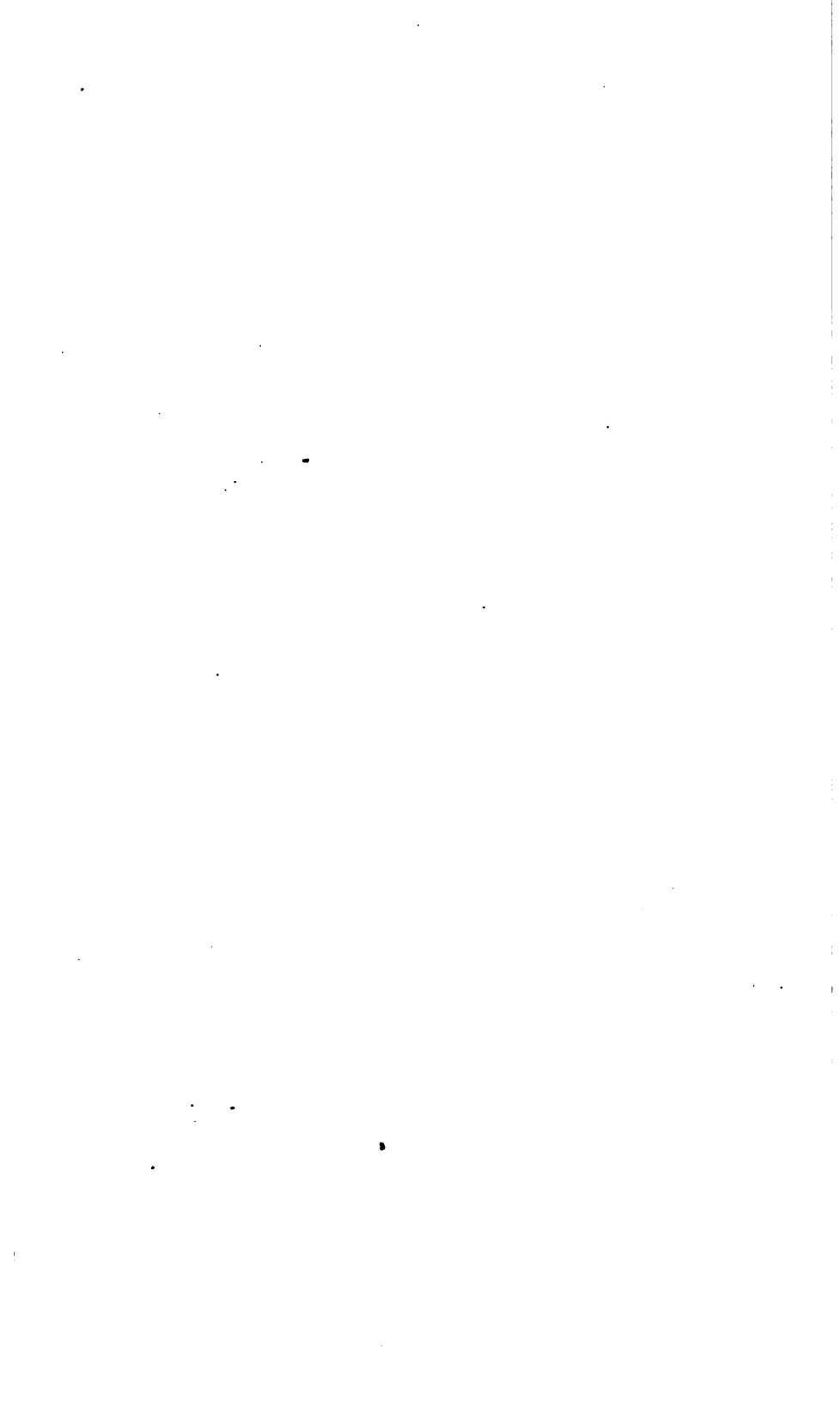
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#### ERRATA.

Page 201. The decision ends with the word "costs." The last sentence should be a note.

Page 295 to 338. The headings should be "The Ship Havre—The Bark Scotland."



# UNITED STATES

## DISTRICT COURT REPORTS.

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SEPTEMBER, 1865.

### THE SCHOONER GEORGE PRESCOTT.

ADMIRALTY PRACTICE.—DEFAULT.—SETTING ASIDE A SALE.—PROCEEDS OF SAILS SOLD BY THE MASTER TO BE BROUGHT INTO COURT.—COSTS.

Several libels were filed against a vessel—one for wages due to the master and crew, one on a bottomry bond, and others for advances and supplies. Defaults were taken on all the processes, and final decrees were rendered, and the vessel was sold under a *venditioni exponas* to one of the libellants for a sum insufficient to pay all the claims. The next day the second libellant applied to the Court to set aside the sale, and open the default taken against him in the wages case, on affidavits alleging that the wages of the crew, and the bottomry bond had been paid, and that there was nothing due to the master. He also alleged that the master and one Smith had stripped the vessel of her sails before her sale by the marshal, so that she had brought an insufficient price. On this a monition was issued to the master and Smith to show cause why they should not produce the sails, and an order was made for all parties to show cause why the sale should not be set aside and the default opened. On the return of this monition and order, the parties appeared and furnished affidavits—that of the master alleging that before the seizure of the vessel by the marshal he took the sails and had sold them for \$600, and that he had not the possession of the sails, and did not know where they were, and that he had a mortgage on the vessel under which he had a right to take them.

*Held*, That as it appeared on the evidence that the vessel was sold for her full value excluding the sails, the Court would not disturb the sale.

That as it appeared that the seamen had not been paid their wages, the application to open the decree in their favor must be denied.

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The Schooner George Prescott.

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That the master's right to a lien being disputed, and it not being made certain that the amount claimed by him was due, and the applicant to open the decree being free from laches, the decree in favor of the master should be opened, and the applicant allowed to contest his claim.

That whatever rights the master had under his mortgage, he could not be allowed to enforce them, as he had done in this case, to the detriment of others who had liens upon the mortgaged property; and as he admitted that he had sold the sails and had the proceeds in his possession, he must be required to pay them into the registry of the Court to meet such claims as were valid liens on the vessel.

The question of costs reserved.

The schooner George Prescott (a British vessel) was libelled on the 11th day of August, 1865, by Robert Johnson, her master, and six of her crew, to recover wages for services in navigating her. Subsequently, on the same day, William H. Birchard filed his libel against the same vessel, her tackle, &c., to recover certain advances alleged to have been made for the purchase of supplies. On the 12th day of August, Benj. R. Luddington and others filed their libel to recover a bottomry debt. Subsequently, on the same day, James M. Hicks and others filed their libel for supplies furnished. On the 15th of August, Josephus F. Packer and others filed their libel for advances; and on the 30th of August, Peter McEnary, pilot, filed a petition for pilotage. On the return of the various processes, no one appearing to defend in any of the actions, an interlocutory decree was made in each cause, and a reference ordered to ascertain the amount due the respective libellants; and upon the coming in of the report a final decree was rendered in each cause, and the vessel condemned to be sold, reserving, however, the question of distribution for the further order of the Court. A *venditioni exponas* was accordingly issued, and on the 14th day of September, the vessel was sold by the marshal to Packer, one of the libellants, who had filed the fourth libel against the vessel, for a sum insufficient to pay the various claims.

On the day following the sale, application was made



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The Schooner George Prescott.

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to the Court in behalf of Birchard, who had filed the second libel, to set aside the sale and open the decrees made in favor of the master and crew, upon affidavits tending to show, among other things, that the amounts claimed by the seamen had been paid them; that no wages were due the master; that the bottomry bond had been paid and discharged before suit was brought on it; that the master, Johnson, and J. Penniman Smith had removed from the vessel her sails and bedding, of considerable value, and so disposed of the same that it had not been seized by the marshal, and that the vessel had thus been sold, stripped of her sails and bedding, with intent to defraud the parties having liens, and defeat them in the enforcement of the claims made in Court against the vessel, her tackle, apparel and furniture. A monition was accordingly issued, citing Johnson and Smith to appear and show cause why they should not produce the sails and bedding of the vessel, and an order made directing all parties interested to show cause why the sale should not be set aside, and the decrees in favor of the master and seamen opened, so as to allow the material man to come in and contest these claims.

Upon the return of the order and monition, the master and crew and the purchaser of the vessel at the marshal's sale, appeared and submitted affidavits tending to contradict the statements made in the moving papers. By consent of all parties, the affidavits of Johnson (the master) and of Smith, were taken as their answer to the petition and monition against them.

For the motion, *Benedict, Burr & Benedict.*

In opposition, *Emerson, Goodrich & Knowlton.*

BENEDICT, J. The relief demanded by Birchard upon this application is threefold. He asks, in the first instance, that the sale of the vessel made by the marshal be set aside, and the vessel remanded into custody to abide

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The Schooner George Prescott.

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the result of his action against her. Without discussing what may be the power of the Court to set aside a judicial sale of a vessel which has been sold, without her sails, to a purchaser who was one of the parties libelling, and who, with knowledge of the other claims pending against her, bought her for a sum insufficient to pay all, I am of the opinion that this part of the application must fail in this case, for the reason that it is not made to appear upon the proof that the vessel did not bring a full price. The evidence before me is, that the full value of the vessel, excluding the value of her sails, was bid, and that amount has been paid into the Registry, where it now is subject to the order of the Court. Upon such a state of facts I decline to disturb the sale.

The libellant Birchard, further asks that the decrees entered in favor of the master and crew be opened, and he allowed to contest these claims. This is opposed upon the ground that the claims are clearly just and due, and further that the decrees were regularly taken in presence of Birchard, with full knowledge on his part of their character, and that by omitting to apply to contest until after the final decrees were entered, he has waived all right now to dispute them.

In cases like the present, where several libels are filed against the same vessel, to pay which the proceeds turn out to be insufficient, and no owner appears, and where one of the libellants, finding the proceeds insufficient to pay his demands, asks to be allowed to show that claims otherwise liable to be paid out of the fund in preference to his own are not justly due, the application is seldom if ever denied. There is, in truth, no time before the actual sale of the vessel when any libellant can know that his interest will be prejudiced by decrees rendered in favor of other libellants, or that any adverse action on his part will be required to secure the payment of his demand; whether any one other than the owner, and if any what one, will be compelled to contest

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The Schooner George Prescott.

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the claims seeking to be first paid, can only be known when the gross amount of the demands is ascertained, and the amount applicable to their payment known by the result of the sale. It is undoubtedly more strictly regular for each libellant in cases like the present, upon the return of the processes, to reserve before the Court his right to contest the demands of the other libellants, when the result of the sale should disclose the necessity ; but this is often omitted, and decrees more often rendered upon the understanding that they do not cut off any right of any libellant before the Court. Here the application was made on the day subsequent to the sale, and on the same day on which the money was paid into the Registry ; and the position of the various actions, with the further fact admitted by the master, that he had expressed to Birchard the opinion that the vessel, if sold as she was, would bring an amount nearly if not quite equal to the amount necessary to insure the payment of Birchard's claim, clearly warrant the Court in holding him free from laches, and allowing him to contest the demands of the master and seamen, if he show good ground of defence. This, however, he fails to do, so far as relates to the claims of the mate and seamen. The affidavits satisfy me that the mate and men have never been paid, and their lien cannot be questioned. The application to open the decrees made in favor of the mate and seamen must, therefore, be denied.

In regard to the demand of the master the facts are different. His right to a lien is disputed ; and I am not satisfied, upon the proofs as they stand, that the amount claimed is due him, and it seems proper that the other parties interested in the fund should be allowed to contest his demand. The decree made in favor of the master is, therefore, opened, and Birchard allowed to come in and contest it.

Birchard further asks, under the provisions of the 8th Admiralty rule, for an order directing the master, John-

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The Schooner George Prescott.

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son, and J. Penniman Smith, to produce and deliver to the marshal the sails and bedding of the vessel.

The affidavit of Johnson, by consent taken as his answer and defence to this application, sets up that before the vessel was seized by the marshal, he took her four large sails and also some bedding; that the bedding was his private property, and no part of the apparel and furniture of the vessel; that he has sold the sails for \$600, and has not the possession or control of them, and is ignorant of their whereabouts; that he has a mortgage upon the vessel for \$1000, and under its provisions he had the right to take and sell the sails and appropriate the proceeds. The answer omits to state how long before the seizure of the vessel the sails were removed, nor does it state when they were sold nor to whom they were delivered. Now, whatever rights in this property the master may have by virtue of his mortgage, it is evident that he cannot be permitted in this way to adjudicate for himself upon them, to the prejudice of seamen, material men, and bottomry creditors, claiming liens upon the same property as part of the vessel. If he had the right before seizure by the marshal to take possession of this property by virtue of his mortgage, still the claims of the various lien creditors attach to it in his hands as well as to the hull; and the right to have it taken, condemned and sold, and the proceeds applied under the order of the Court, cannot thus be defeated. And this right of lien creditors, which attaches to the vessel herself, her tackle, apparel and furniture, and to every part thereof, in cases where the property has been sold or disposed of so that it cannot be reached *in specie* by the process of the Court, may be enforced against the proceeds of the property, in whose hands soever it may be found, and that either by the order of the Court or by its judgment and decree. Such has often been the action of Courts of Admiralty. (The *Harmonie*, 1 *W. Rob.* p. 179; *Cooté's Pr.*, p. 97.) See also *Pitman v. Hooper* (3 *Sum.*

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The Schooner George Prescott.

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pp. 50 and 305), where, before Judge Story, an action in the nature of a proceeding *in rem* against the proceeds of a vessel was maintained some twenty-eight years after the performance of the service, and where the fund proceeded against was the sum then first awarded by a foreign government as compensation for the seizure and sale of the vessel twenty-eight years previous.

As this master then concedes that he took the property in question, has sold it, and now has the proceeds in his possession, he must be required to pay such proceeds into the Registry, there to be subjected to such claims as may be held to be valid liens upon this vessel.

With regard to the proceeding, as against Smith, I think a fuller examination of the facts attending his connection with the disposition of this property is necessary before making any order against him. I shall therefore direct a reference to a commissioner, to ascertain and report as to the truth of the allegations made against him.

In thus disposing of the various applications made in behalf of the libellant Birchard, I have in no way passed upon the validity of his claim as against this fund. That claim the master may contest if so advised, and the decree made in favor of Birchard will be opened for that purpose.

Neither have I passed upon the effect of evidence tending to show some understanding between Birchard and the master, that the claim of the master should be first paid. All these questions I leave to be disposed of when they arise upon the hearing of the causes, or upon the motion to determine the priorities of the various libellants.

I also reserve the questions of the costs of entering the decrees now set aside, till the final order of distribution.

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The Schooner Charles Henry and Cargo.

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OCTOBER, 1865.

## THE SCHOONER CHARLES HENRY AND CARGO.

PRINCIPLE OF SALVAGE.—DERELICT.—DISTRIBUTION.—PASSENGERS.—  
LIBELS BY DIFFERENT SALVORS.—COSTS.—COUNSEL FEE.

Where a vessel fell in, off Cape Henlopen, with a wreck, which, on being boarded, proved to be a derelict, and the master put on board her a crew, consisting of his mate and cook and two men, who were being carried to New York at the expense of the owner of the salving vessel, who brought her in safety to New York, the value of the vessel and cargo being \$8,700.

*Held*, That the spirit of the rule which governs salvage awards, requires that while they should not be extravagant, they should always be generous.

That the rule in cases of derelict is to award a moiety, the burden being on the claimant to show that a different measure should be applied.

That the rule allowing compensation to the owners of the salving vessel is too firmly established to be shaken, and the habit of Courts of Admiralty is to award them a third.

That the responsibility thrown upon the master and his rank are to be considered in fixing the share to be paid to him.

That a passenger who was bold in advising the master to attempt the service, and active in helping to perform it, was entitled to an increased share on that account.

That passengers who refused to volunteer to assist when solicited, are not entitled to share in the award.

That there should be but one libel filed in ordinary salvage cases, and costs paid for but one.

That part of the costs might be paid out of the remaining share of the proceeds, but that there were no circumstances which called for an award of a counsel fee.

Ordered that the clerk's and proctor's fees be first paid out of the fund, and that half the remainder be divided into twenty-one shares, of which the owners were to have seven, the master five, and the passenger three. The remainder to be divided among the crew and the other passenger according to their wages. The passenger to rank with the mate. Marshal's fees and commissioner's costs to be paid out of the remaining proceeds.

The libel in this case was filed by John C. Rahming, the owner, and the master and crew of the schooner Georgiana, in behalf of themselves and all others inter-

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The Schooner Charles Henry and Cargo.

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ested against the schooner Charles Henry and her cargo, to recover salvage. The Charles Henry as well as her cargo was seized, under process, issued according to the prayer of the libel, and thereafter John Dempster Cousins, who was a passenger upon the Georgiana, not fully satisfied with the presentation of the case as made in the libel of the owner, appeared by his own proctor, and asked and obtained from the Court leave to set forth his services and demands with more particularity in a supplemental allegation. Subsequently, Dominick Buckley, another of the passengers upon the Georgiana, filed a libel, setting forth his services in effecting the salvage, and process was issued in his behalf. Subsequently, by order of the Court, the two causes were consolidated. No one appearing on the part of the Charles Henry or her cargo upon the return of the process, it was accordingly adjudged that the schooner and her cargo be condemned to pay salvage, and a reference was ordered to a commissioner, to take such testimony as the respective parties appearing might offer in support of their allegations, and report the same to the Court. Upon the coming in of the testimony taken before the commissioner, the various libellants appeared before the Court, by their respective advocates, and presented their views upon the question of the amount of salvage to be awarded, and its distribution among the salvors.

There was little or no dispute as to the circumstances attending the saving of the vessel proceeded against, or the part taken by the parties who claimed to be the salvors. The proofs showed that about midday on the 24th of August last, when the Georgiana, bound to New York, was about thirty miles from Cape Henlopen, a wreck was descried, lying in her course. Upon coming up with it, the libellant, Cousins, proposed that it be boarded, and overcoming some slight objection on the part of the master, on account of the sea running, went into the stern boat, which was lowered, and with the

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The Schooner Charles Henry and Cargo.

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master, the cook and two seamen, proceeded to the wreck. It proved to be the schooner Charles Henry, laden with coal, water-logged and abandoned. She was found to be in great disorder, full of water, with one pump choked, and the sea making a clean breach over her. She was, in fact, a derelict in a sinking condition, and, in the opinion of some of the witnesses, would have gone down within six hours if no aid had been afforded her. After trying the pumps, it was determined, upon a consultation between the master and Cousins, to make an effort to free her, and bring her into port. The effort proved successful. By active pumping she was freed from water, and sails were set. A crew, consisting of the mate of the Georgiana, two passengers, Cousins and Buckley, and the cook, were put in charge, with orders to follow the Georgiana, which latter vessel, by slackening sail, kept her in sight, and led the way, until, after the expiration of two days and eight hours, both vessels arrived safely in the port of New York.

The value of the Charles Henry and cargo amounted to about \$3,700.

For libellant Rahming, *Benedict, Burr & Benedict*.

For libellant Cousins, *Charles Edwards, Esq.*

For libellant Buckley, *J. J. Rogers, Esq.*

BENEDICT, J. The facts of this case present all the elements of a salvage service as frequently declared in Courts of Admiralty, and entitle the libellants to be rewarded as salvors according to the settled rule of the maritime law. This rule rests upon an enlarged view of public policy, and declares it to be for the interests of commerce, that when property at sea, and in danger, is saved by exertions voluntarily rendered, a suitable reward for such exertions should be given out of the prop-



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The Schooner Charles Henry and Cargo.

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erty saved. It is for the safety and interest of commerce that this rule be always enforced in the liberal spirit which originated it, to the end that whenever disaster occurs upon the sea, all persons having opportunity to afford relief, shall feel assured that efforts expended in behalf of property in peril, if shown in a Court of Admiralty, will not fail to bring returns more advantageous to the salvors, than can be obtained by plunder of wrecks ; and that time expended in salvage services, receives more ample reward than the ordinary recompense of freight or charter money. The spirit of the rule requires that salvage awards, while they should not be extravagant, should always be generous.

These considerations are not new. They have long been acted upon by foreign, as well as American Courts of Admiralty ; and by merchants and underwriters in many cases, never brought before the Courts. Indeed, I think it might be added that the merchants have generally applied the rule of the maritime law with a generosity more liberal than that sometimes exhibited by the Courts.

The facts attending the saving of this wreck do not require at my hands any extended examination to enable me to determine the amount of salvage to be decreed. It is a case of a derelict, and no one appears as claimant. I content myself with adopting the language of Judge Story in the case of the brig —— (1 *Mason*, p. 377, *Rowe v. the brig* ——.) “ In cases of derelict, the old rule should still be considered as a subsisting but flexible rule, that, *prima facie*, the salvors are entitled to a moiety ; and it is incumbent on the claimant to establish that, under the special circumstances of the case, a different measure ought to be applied.”

I therefore award to these salvors one half the proceeds of this vessel and cargo, as their salvage reward in this case ; and as the value of the property is not great, and no one has appeared to claim it and avoid the ex-

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The Schooner Charles Henry and Cargo.

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pense of the proceedings by payment or tender, and inasmuch as the expenses of the custody and storage of the cargo and of taking proof of the facts have been considerable, I shall direct that the proctor's and clerk's costs only, be deducted from the gross proceeds, and that the marshal's and commissioner's fees be paid out of the proceeds remaining, after payment of the salvage as awarded. It was urged upon the argument, that a counsel fee should also be awarded out of the fund, if not to each advocate, at least to the one originating the proceedings; but I see nothing in the case to call for such additional allowance.

There remains to determine in what proportions the salvage shall be distributed among the salvors. Upon this question it has been urged in behalf of the passengers, that the owner of the Georgiana should receive but a small, if any, part of the award, inasmuch as he did not personally partake of the risk or share in the labor. But I cannot give to this proposition my assent. Were such a doctrine established, it would defeat the object of the law; for let owners understand that they derive no benefit from the performing of salvage services by their vessels, and orders to their masters to avoid rendering the services will soon follow.

The contrary rule is too firmly established to be now shaken. Courts of Admiralty in all cases not only give consideration to the claim of an owner to participate in salvage awarded, but in the distribution give him a liberal share. As to what this share should be, while there is no rigid rule, there is in the Court of Admiralty a well established "habit."

In ordinary cases, the habit of the Court is to give to the owners one-third of the amount (The Henry Ewbank, 1 *Sum.*, p. 426), and no reason is seen for deviating from the rule in the present case. One-third of the salvage awarded will accordingly be paid to the owner of the Georgiana. The claim of the master of the Georgiana,

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The Schooner Charles Henry and Cargo.

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Captain Foster, stands next in rank. The proofs show that the salvage service in question was performed under the immediate orders and superintendence of the master. He boarded the wreck, and directed the labor of preparing it for a successful voyage to a port of safety. He detailed his chief mate to navigate the wreck, and was thereby compelled to take upon himself double duty on his own vessel. He kept the wreck in sight until it was anchored in New York. The *responsibility* of the adventure from beginning to the end was upon him, and to this element in his case I give much consideration. As a class, the masters of our commercial vessels receive no extravagant compensation, while they are compelled to assume great responsibilities, and the full weight of this responsibility they are often made to feel when a voyage or adventure, although undertaken and conducted according to their best judgment, under the circumstances, proves in the end disadvantageous to the owner. I consider, therefore, not only the labor of this master, but his rank and responsibility, in fixing the portion to be given him, and shall give him a liberal reward. There remain the claims of the passengers and crew. It appears from the proofs, that the Georgiana had on board, in addition to her crew, six persons who were in the employ of the owner, and were being transported by him to New York at his expense. Two of these, Cousins and Buckley, formed part of the crew which navigated the wreck into port. On the part of Cousins, it is insisted that he is entitled to an original and liberal portion beyond that of any person composing that crew. I have examined the evidence touching the services of this libellant with care, but do not find that it discloses any extraordinary labor performed by him. So far as navigating the vessel into port is concerned, all on board shared in the labor alike, and little weight can be given to the fact that he helped to lower the stern boat, or was first on the deck of the schooner. Nor was any especial skill as a navigator at

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The Schooner Charles Henry and Cargo.

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any time displayed or required on the part of this passenger. It is, however, shown that he had acted as chief mate on other vessels, and his counsel was sought by the master of the Georgiana, as to undertaking to save the schooner. He boldly urged action, and sustained his advice by taking the lead under the master, in the measures adopted to effect the salvage. A timorous opinion expressed by him, or less vigorous action on his part, might have led the master to avoid taking the responsibility of attempting to get the vessel into port, and for this reason a larger portion should be awarded to this passenger than can be claimed by the passenger Buckley, or even the mate. Cousins and Buckley were the only persons out of six passengers who took any part in effecting the salvage. The boat returned from the wreck for volunteers to form a crew, and none of the passengers would volunteer but Buckley. Because of their refusal to volunteer when solicited, I refuse these persons any portion of the reward (The Baltimore, 2 Dod. 132). The remainder of the salvage is to be distributed among the crew of the Georgiana. Buckley, however, should be included, and rank with the mate. I should refuse all costs of his libel to Buckley if there were not some special circumstances which justified an additional libel in his behalf. In ordinary cases, but one libel should be filed, and costs allowed for but one.

Let, therefore, the clerk's and proctor's costs, when taxed, be first paid out of the proceeds in Court, and one-half the remainder be divided into twenty-one equal shares. Let the owner have seven shares. Let the master, Foster, have five shares. Let Cousins, the passenger, have three shares; and let the remaining six shares be divided among the crew, including Buckley, making six in all, according to their respective rates of wages as proven. Buckley to be rated with the mate, and the crippled sailor, who was upon the articles at nominal wages, to be rated at \$10 per month.

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United States v. 300 Barrels of Whiskey.

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And let the costs of the marshal and the commissioner's fees, when taxed, be paid out of the remaining proceeds.

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NOVEMBER, 1865.

THE UNITED STATES v. 300 BARRELS OF  
WHISKEY.

INTERNAL REVENUE.—PRACTICE.—BONDING PROPERTY UNDER SEIZURE.—POWERS OF THE COURT.

This property was proceeded against under the Internal Revenue Acts of June 30, 1864, and March 3, 1865. The property being under seizure by the marshal, the claimant applied for leave to bond it.

*Held*, That the Court has power, independent of any statute, to discharge upon bail property in custody, in cases of seizure under the Import Acts, whether upon land or water.

That the same power exists in the present case under the 48th and 50th sections of the Revenue Act of June 30, 1864.

This was an application on the part of the claimant of the property seized, to have the same delivered to him upon giving security in the amount of the value thereof. The motion was founded upon a petition showing that the property was proceeded against for a violation of the Internal Revenue Act, passed June 30, 1864, and amended March 3, 1865; that upon filing the information, process was issued against the property, and the same was seized by the marshal and taken into his custody without objection on the part of the Collector of Internal Revenue, and was still in the custody of the marshal under the process in this cause, and that no opportunity existed to try the cause at the then present term.

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United States v. 300 Barrels of Whiskey.

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For the United States, *B. D. Silliman, Esq., U. S. District Attorney.*

For claimants, *Messrs. Cooper & Roe.*

BENEDICT, J. The act to provide Internal Revenue nowhere in express terms confers upon any Court the power to deliver to the claimant on bail, pending the proceedings, the property claimed to be forfeited to the United States under its provisions. Nor do I find that by express provision or by implication the power is withheld. It is true, that the proviso to section 48 seems to contemplate in certain specified cases, the giving of a bond to the assessor to be by him filed in the office of the Commissioner of Internal Revenue, but it does not appear that, in such cases even, the order of the Court can be dispensed with. What construction should be given to section 48 it is not necessary, however, to decide here, inasmuch as in the case before the Court, the privilege is not asked upon the ground that the property is perishable or otherwise, within the proviso of that section. But although the act does not by express terms confer the power here sought to be invoked, it is apparent that the intention of the act was that proceedings under it should conform in this respect to the methods heretofore pursued in cases of seizure under previous revenue laws. Thus, section 48 provides that the proceedings to enforce forfeiture under the act shall be "in the nature of *proceedings in rem*," while section 50 provides that the act of March 2, 1833, entitled "An act to provide for the collection of duties and imposts," shall extend to all cases arising under the laws for the collection of internal revenues. Now, section 2 of the act of 1833, expressly provides that all property taken or detained by any officer or other person under the authority of any revenue law of the United States shall be irremovable, and shall be deemed to be in the custody of

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United States v. 800 Barrels of Whiskey.

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the law, and *subject only to the orders and decrees of the Courts of the United States having jurisdiction thereof.*

These provisions, taken together, seem to me to warrant the conclusion that if the Courts of the United States have, in cases of seizure upon land, under the import acts, the power independent of any statute, to discharge upon bail property in custody, the power exists in a case like the present. No reason is seen why this power should not, in a proper case, be exercised as well in cases of seizure under the Internal Revenue Act, as in cases of seizure under the import acts.

Now the power of releasing property upon bail, pending the proceedings, has been in constant exercise in most, if not all cases of seizure under the import acts, and been deemed to be one of the inherent powers of the Court over property in its custody. Indeed, it would seem to be a power necessary to the proper exercise of the jurisdiction of the Court in most cases, *in rem*, for in such cases the proceedings might sometimes prove futile, and the decree, when made, a barren one, without the exercise of such a power. So in cases of property seized upon the waters for a violation of the revenue laws, the order to deliver on bail has been an order almost of course, and this too without any statute conferring the power, but by mere rule of Court. This practice, in such cases, has been adjudged upon appeal to be warranted by law, and judgment given upon bonds so taken. (The Alligator, 1 Gal. 145, Story, J.)

Nor has the exercise of this power been confined to seizures upon the waters. The case of the United States v. Woolen Cloth (1 Paine, 435), was a case of a seizure upon land. Thompson, J., there held that a bond taken in the District Court, upon request of the claimant to obtain an order for the discharge of the property pending the proceedings, was valid, and the point being taken that no statute authorized the taking of the bond, the Court so held, but declared the power to be one of the

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United States v. 300 Barrels of Whiskey.

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inherent powers of the Court, to be exercised in its discretion, independent of any statute.

The practice which has grown up under these decisions has proved, I think, a beneficial one, not only to claimants, but to the Government. Any other practice would be likely to entail upon the Government large expenses for the storage, custody and care of all property seized as forfeited. Property held during long periods to await the result of litigation, is necessarily subject to great risk of loss by fire, by thieves, &c. This very case may be taken as an illustration. These three hundred casks of whiskey of a certain proof, now worth \$23,449, are on storage, and if not bonded, must remain in custody until the final termination of the action. Can any one doubt that the risk of its turning out at the end of the litigation less in quantities, proof and value, is greater than the risk of the solvency of competent sureties, carefully selected and sworn?

It seems to me, therefore, that the power in question is one conducive to justice, and must be considered as resting both on principle and authority.

I have given this question more careful attention, because it was suggested, on the part of the Government, that a different opinion has been expressed in another district. I do not learn, however, that any case like the present has been passed on. Here the property is in the actual custody of the marshal, and the District Attorney does not oppose the application. In such a case, no Court, to my knowledge, has denied its power to discharge on bail; while it is believed that the power has been exercised in many districts in cases under the internal revenue acts, and that without question.

It may perhaps be proper to add, that the Commissioner of Internal Revenue denied an application made to him for the discharge of this whiskey on bail as perishable, as appeared by his letter made part of the motion papers, and added,



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The Ship Empire and Cargo.

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“The Court, however, in which proceedings for forfeiture are now proceeding, has jurisdiction of the matter, and can order a release, if, in its judgment, such release is proper.” The motion for the release of the property is therefore granted, and an order to that effect will be entered, upon filing in Court a bond in the value thereof, as fixed by appraisers appointed by the Court; the bond to be in a form approved by the District Attorney, and executed by two sureties to be approved by the District Attorney and Clerk.

The importance of having the practice in this class of cases uniform throughout this Circuit, has led me to submit this opinion to the presiding Justice of the Circuit, and he concurs with me in the view I have taken of the law.

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JANUARY, 1866.

## THE SHIP EMPIRE AND CARGO.

### MOTION TO REMAND VESSEL INTO CUSTODY, AND CANCEL STIPULATION.

Where a vessel and cargo were libelled for salvage, and bonded in their full value, and thereafter the owners of the cargo filed a libel against the vessel, claiming to recover the damages occasioned to the cargo by the disaster out of which the salvage claim arose, to an amount equalling the value of the vessel, and thereupon, before this process was returned, the stipulators for value in the salvage case applied to have their stipulations cancelled, and the vessel remanded to custody, under the process in the salvage case;

*Held*, That the application was premature, and could not be entertained before the process was returned, and notice published as required by the rules, because till then all parties were not before the Court.

Whether relief could be given in such a case,—*quere*.

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The Ship Empire and Cargo.

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On June 23d, 1865, a libel was filed against the ship Empire and her cargo by Nathan E. Edmonds and others, representing the steamer Andrew Fletcher, to recover salvage for having pulled the ship off from the shoals near Cape Hatteras. On the same day another libel was filed by Samuel Greenwood, who was on board the steamer, on behalf of all persons interested, for the same cause of action. The two actions were consolidated by order of the Court. Moses Taylor & Co. appeared as claimants of the vessel, and John F. Schepeler appeared as claimant of the cargo, and they gave stipulations respectively for the value of the vessel and the cargo, whereupon both vessel and cargo were discharged from custody.

On Nov. 22d, Schepeler, the owner of the cargo, filed a libel against the ship, alleging that the vessel was got on shore by the wrongful negligence of the master of the ship, and that the vessel was liable for the damages occasioned to the cargo thereby to an amount exceeding the value of the vessel. The vessel was again seized under process issued in this action, and while she was in custody, yet another libel was filed against her by Prince S. Borden, on behalf of all persons interested in the steamer Arkansas, claiming to have been also active in rendering salvage services to the Empire on the same occasion. Process was also issued against the vessel in this action. Before the notices required under these processes had been returned as duly published, the agent of the owner of the ship who had given the stipulation for her value in the first cases, applied to the Court on notice to all the libellants, on a petition setting forth that the owner was a non-resident, and that he had given the stipulation in question for the owner's account, with no security except the vessel herself, and that that security was endangered by the filing of the latter libels, and praying that the marshal might be directed to hold the vessel under the processes issued in the first salvage action, as well as under the latter processes, and that

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The Ship Empire and Cargo.

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the stipulation which he had given for the value of the vessel might be cancelled.

The motion came on to be heard on Jan. 5, 1866. The cases of *Henderson v. The Union*, and *Gardiner v. The White Squall*, decided by Judge Nelson in the Circuit Court, were referred to on the argument.

For the motion, *Messrs. Miller, Peet & Nichols*.

In opposition, *Mr. Whiting and Mr. Choate*.

BENEDICT, J. The present motion, if it can be entertained at any time, is at this time premature, inasmuch as the processes issued upon the latter libels have not been returned. When they have been returned, and notice shall have been published in the usual way, the motion may be renewed, but in the present position of the actions, it must be denied.

I think it proper to add for the information of counsel, that in addition to the cases cited, there exists a case bearing upon the question involved, which was decided by Judge Betts. I allude to the case of the steamer *Jewess*.\*

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\* December, 1854.—United States District Court, Southern District of New York. *Herman T. Livingston v. The Steamship Jewess*; *John L. Lockwood v. The Same*.

These were motions in behalf of a stipulator to be discharged from his undertakings. The vessel was arrested on process of attachment in each suit, and thereupon Mr. Sands, the petitioner, entered into stipulations in each case for costs, and also to satisfy the final decree, and the vessel was accordingly discharged from arrest in the causes.

On the next day, August 10, the vessel was again attached under process issued in behalf of seamen. She remained in custody under that process, and numerous others issued in behalf of material men, until she was sold by consent of all parties (since these motions), and the proceeds brought into Court, the rights of all parties to remain unaffected by such sale. The stipulator now moves to be exonerated from his undertakings, and that the stipulations be vacated by order of the Court.

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The Ship Empire and Cargo.

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*Held by the Court, Berra, J.,* That though a stipulation to respond to the final decree be given on the discharge of property from arrest, still the *res* is not regarded as discharged from the jurisdiction of the Court, so as not to be reclaimable on the same process, if the equities and rights of the parties demand it. And accordingly the Court will order additional sureties to the stipulation, or re-arrest the property to satisfy the lien upon it, upon proof that the libellant is like to be prejudiced by leaving it on the bail substituted in its place. But there is not equal equity in favor of the stipulator to authorize his discharge from his undertaking, on restoring the property to the custody of the Court. And it is clear, upon the principles of the Admiralty practice, that the stipulator cannot do this at his option (*Ware, 296*), nor can it be done by order of the Court, merely at the instance of the stipulator and for his relief. He is regarded as voluntarily having made a *conventional* undertaking with the libellant, which, in the ordinary course of an Admiralty action, concludes him from its conception to its completion.

But that another element of equity has been mingled with this case by the re-arrest of the property; that the object for which the stipulations were given, viz., that of allowing the ship to be employed in her appropriate business, was frustrated by the act of the law, in no way promoted or concurred in by the stipulator; that the claimant was deprived by act of law of the benefit of the discharge, and that deprivation was so nearly concomitant with the discharge itself, as equitably to operate as a revocation of it, particularly in respect to a mere surety.

That if the stipulator, immediately upon the seizure of the vessel on August 10, had, upon that fact, applied to the Court to rescind his stipulation, the application must have been granted from the manifest justice of not fastening on him, as surety, an obligation, when the purposes for which it was entered into had been intercepted and defeated by act of law, and when no legal or equitable right of the libellants against the vessel would be changed or diminished by such discharge.

That as those rights and equities remained in the same position when the petition was presented, the surety should not lose his claim to relief because he omitted to ask it at the earliest day.

The order therefore is, that the petitioner be exonerated on paying the costs of this application.

For the application, *Mr. Betts and Mr. Burrill.*

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The Propeller Chesapeake.

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FEBRUARY, 1866.

## THE PROPELLER CHESAPEAKE.

COLLISION IN THE EAST RIVER.—VESSELS CROSSING.—PLEADING.—  
MOVEMENT IN IMMINENT DANGER.

Where a propeller coming down the East River, had a ferry-boat, which was crossing from New York to Brooklyn, on her starboard hand, and the ferry-boat kept her course, as was admitted by the answer—*Held*, That under articles 14, 16 and 18 of the Rules of Navigation, the propeller would be liable for a collision under such circumstances.

That the effort on behalf of the propeller to make out a special case under article 19 was not only inconsistent with her answer, but was not sustained on the evidence.

That under the circumstances it would have been prudent for the propeller to have ported her helm and gone under the ferry-boat's stern, whereas she did attempt to cross her bows, and that having selected the most hazardous of two courses open to her, she must be held responsible for its failure of success.

That the excuse that the ferry-boat stopped her wheels and so led the propeller to starboard, is not made out.

That the fact that the propeller, as she neared the ferry-boat, blew two whistles and received two whistles in reply, does not alter the case. The two whistles in reply would amount to nothing more than an indication that the ferry-boat acquiesced in the right so claimed by the propeller to select her own method of avoiding the former. Moreover, the danger was then imminent.

The facts in this case sufficiently appear in the opinion of the Court.

For libellants, *B. D. Silliman, Esq.*

For claimants, *John E. Parsons, Esq.*

BENEDICT, J. This is a case of collision between the ferry-boat Manhasset, which was crossing the East River from New York to Brooklyn, and the propeller Chesapeake, which was passing through the East River, on her way to Fort Lafayette, on the 2d of December, 1864.

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The Propeller Chesapeake.

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The law applicable to the case, is to be found in the rules and regulations for preventing collisions, adopted by the Act of Congress of April 29, 1864. By these regulations it is declared to be the duty of a steamer, which, when crossing so as to involve risk of collision, has the approaching vessel on her own starboard side, to keep out of the way of such approaching vessel, and the duty of the steamer so approaching, to keep her course. (Articles 14, 18, Act of April 29, 1864.) Judged by this rule, the case as stated in the answer of the propeller would seem to be in favor of the ferry-boat; for the answer, while it admits that the ferry-boat was crossing, and the propeller coming down the river, the ferry-boat being on the starboard side of the propeller, also admits that the ferry-boat kept her course, and that the propeller, while attempting to cross her bows, struck her amidships on the port side. No fact is put forth in this answer as tending to take the case out of the general rule; and the fault it charges upon the ferry-boat is, in not changing her course and passing under the stern of the propeller. Upon such an answer, if it stood alone, the libellants would be entitled to a decree. As presented to the Court upon the evidence, the case differs from that disclosed in the answer, in this, that special circumstances are claimed by the respondents to have been shown, which rendered a departure from the general rule, as laid down in articles 14, 16, and 18, necessary and justifiable under the proviso of article 19 of the same act.

This claim to have the case considered a special one rests upon evidence tending to show that a sloop and schooner were beating down the river on the New York side, between the propeller and the ferry-boat, rendering it impossible for the propeller to pass to the right and so allow the ferry-boat to keep her course, while the presence of another vessel coming down the river behind the propeller, is relied upon as showing that it was impossible for her to stop and back sooner than she did.

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The Propeller Chesapeake.

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With regard to this evidence, introduced by the respondents without objection on the part of the libellants, for the purpose of making out a special case within the meaning of article 19, it is to be noticed that it is inconsistent with the answer. The theory of the answer is, that it was possible for the ferry-boat, and accordingly her duty, to have starboarded her helm, and so passed between the propeller and the New York shore; but if, as now contended, the presence of a sloop and schooner, beating down between the propeller and the ferry-boat, rendered it impossible for the propeller to port, it must have been, for the same reason, impossible for the ferry-boat to starboard; and as to the impossibility of stopping and backing, the answer nowhere avers such impossibility, but rather implies the intention on the part of the propeller to avoid the ferry-boat by keeping on.

The theory, then, advanced upon the trial, and based upon these special circumstances, might well be rejected as irreconcilable with the averments of the answer.

It is not, however, intended to rest the decision here upon a question of pleading, but to consider the whole case as disclosed in the evidence. With this view I have carefully examined the testimony relied upon as showing that the propeller was prevented from porting by the presence of other vessels, and while I find positive evidence that a sloop and schooner were beating down the river at the time in question, I also find evidence which satisfies me that these vessels were not in a position to interfere with the propeller in any attempt she might have made to pass under the stern of the ferry-boat. The controlling evidence upon this point is found in the testimony of the master of the propeller. This witness, who was at the wheel, directing the navigation of his vessel, states that when he saw the sloop and schooner he was just below Jackson Street; that he starboarded his helm in order to clear them, and "held his sheer

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The Propeller Chesapeake.

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long enough to get by them"; that he "then ported the wheel, so as to steady the vessel," and "kept his course right down at full speed." He also says that he saw the ferry-boat when "in the act of passing the sloop and schooner," and not before. Now the fact stated by this witness that after he saw the ferry-boat, and when on a sheer towards the Brooklyn shore, he ported his wheel and steadied his vessel on a course right down the river, renders it highly improbable that the ferry-boat was then approaching on his starboard side, within any short distance. Had the ferry-boat, sloop, and schooner been so near each other as to render it necessary for him to pass across and near to the bows of the ferry-boat, as well as the bows of the sloop and schooner, he would not have ported his helm when he did. The manœuvre, of itself, shows that the sloop and schooner, when passed by the propeller, were a sufficient distance above the ferry-boat, to have enabled the propeller to pass between them in safety and under the stern of the ferry-boat.

Other evidence in the case confirms this conclusion. Thus the master states that when he first saw the ferry-boat—which was when he was passing the sloop and schooner—he was probably three hundred yards from her, and that in going that distance in that tide he could sheer his vessel eight points. Of course, then, he had room to pass the stern of a vessel which, with helm hard a starboard, he only reached to strike amidships. The second mate of the steamer estimated this distance at 800 yards, and put the sloop and schooner 1,000 yards distant, approaching at right angles; while another witness introduced by the respondents, and who was standing upon pier 39, stated that he saw no vessels near enough to interfere with the movements of the propeller and ferry-boat. The testimony, then, of the respondents' witness—confirmed, as it is, by several witnesses produced by the libellants—clearly disposes of the allega-



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The Propeller Chesapeake.

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tion that the propeller was prevented by other vessels from passing to the stern of the ferry-boat.

So also the evidence fails to support the allegation that the presence of other vessels under the stern of the propeller rendered necessary a departure from the general rule requiring every steamship, when approaching another so as to involve risk of collision, to slacken her speed, or, if necessary, to stop and reverse. It would appear that there were some vessels passing down the Brooklyn side ; but the fact that the last sharp sheer of the propeller to the Brooklyn shore compelled these vessels to back hard to avoid her, shows that before that sheer the propeller could have stopped without interfering with them. And, besides, if any vessels were following the propeller, it is to be presumed that they were being managed in view of the rule (Art. 17, Regulations of 1864), which casts upon a vessel following, the responsibility of avoiding the vessel ahead, and were therefore prepared for any stoppage, or other necessary manœuvre on the part of the propeller.

As I view the case, then, it cannot be considered as a special one within the meaning of the proviso of article 19, of the act of 1864, but must be treated as a case of two steam vessels meeting under ordinary circumstances, and governed by the general rule.

Accordingly, the burden is upon the propeller, to show that she adopted timely and prudent measures to avoid the ferry-boat, which failed of success by reason of some fault on the part of the ferry-boat. This the propeller has failed to do. The prudent measure under the circumstances, was to port her helm and go under the stern of the ferry-boat. She attempted to pass her bows ; and having selected the most hazardous of two courses open to her, she must be held responsible for its failure of success. But it is said, "the ferry-boat stopped her wheels and so led the propeller to starboard her helm as the proper consequent manœuvre, and after

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The Propeller Chesapeake.

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she had starboarded, it was too late to again change upon seeing the wheels of the ferry-boat start." This excuse, which is not to be found in the answer, is without foundation in the evidence. The testimony of the pilot and engineer of the ferry-boat, which agrees in this respect with the answer of the propeller, shows that the wheels of the ferry-boat were stopped, but instantly put in motion again without affecting in any considerable degree the headway of the vessel; while the testimony of the master and mate of the propeller is positive that no change was made in the course of the propeller by reason of this momentary stopping of the ferry-boat's wheels. These two witnesses agree in the statement that the propeller kept on her course down the river until the wheels of the ferry-boat started, and that it was after the wheels of the ferry-boat were seen to start that the helm of the propeller was put astarboard. Upon the evidence, then, the stopping of the wheels of the ferry-boat cannot avail to excuse the propeller for starboarding instead of porting her helm.

Considerable stress was laid by the respondents upon evidence tending to show that the propeller, "as she neared the ferry-boat, blew two whistles as a signal that she desired to continue her course," and received two whistles in reply from the ferry-boat; but I do not see how this fact, if it were clearly proved, would, in view of the other facts of this case, materially change the aspect of the defence. Two whistles in reply, from a vessel crossing as the ferry-boat was, would amount to nothing more than an indication that she acquiesced in the right so claimed by the propeller, and given her by the law, to select her own method of avoiding the ferry-boat; and it is not shown that at the time of the alleged reply of the ferry-boat, any change of course was made in either vessel.

Moreover, to these whistles, as also to the starting of the wheels of the ferry-boat, the remark applies

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The Propeller Chesapeake.

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that the danger was then imminent. The master of the propeller says he rang his four bells in as quick succession as possible, and as soon as he saw the wheels start, and yet he struck the ferry-boat just as his engine began to work back. No mistake committed by the ferry-boat at this late moment would excuse the propeller for placing the vessel in a position of such peril. The duty to avoid the ferry-boat was upon the propeller from the time the ferry-boat was seen to be crossing on her starboard side; and yet, according to the testimony of her own principal officers, the propeller steadied herself on a course right down the river and across the track of the ferry-boat, and held that course, without change and at full speed, until so near that a collision was imminent, when she for the first time changed her helm and then put it to starboard.

Upon her own showing, there appears to me to have been an absence of that care and skill in the management of the propeller, which the law requires of a steamship when crossing the track of another, and I cannot doubt but that she should be held responsible for the damages that ensued.

Let the decree be for the libellants, with an order of reference to ascertain the amount of damages.\*

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\* This case was affirmed by the Circuit Court on appeal.

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The Steamship Favorita.

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FEBRUARY, 1866.

## THE STEAMSHIP FAVORITA.

**COLLISION IN EAST RIVER.—STEAMERS CROSSING.—FERRY BOAT IN FAULT FOR NOT KEEPING HER COURSE.—STATE LAW.—EVIDENCE.—WHISTLES.—APPORTIONMENT OF DAMAGES.**

Where a ferry-boat crossing from Brooklyn to New York, after getting out of her slip, saw a steamship coming up the river which had already sheered to star-board to go under the ferry-boat's stern, and instead of keeping on, stopped and backed, her pilot then blowing two whistles, but the steamship, though stopping and backing, could not then avoid the collision, but struck the ferry-boat in the side at right angles;

*Held*, That the ferry-boat was in fault in not keeping on her course.

That the two whistles blown after the pilot of the ferry-boat had stopped and backed, amounted only to a notification of what he had done, and gave to the steamship no opportunity of assenting or dissenting; and dissent on the part of the steamship by whistles then, would have availed nothing.

That the ferry-boat was in fault in going out of her slip at full speed, without keeping a careful look-out for approaching vessels.

That the steamship was also in fault in not complying with the State law in regard to the navigation of the East River, and going as near the middle of it as practicable.

That both vessels being in fault, the damages must be apportioned.

That evidence from persons on the bows of the steamship, not concerned in her navigation, but acquainted with the harbor and the capacities of vessels, is entitled to great weight on the question whether the collision would have been avoided, if the ferry-boat had kept her course.

The facts in this case sufficiently appear in the opinion of the Court. The libel did not charge upon the steamship as a fault that she was not navigated in the middle of the East River, as required by the State law.

For libellants, *B. D. Silliman, Esq.*

For claimants, *Messrs. Benedict, Burr & Benedict.*

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The Steamship Favorita.

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**BENEDICT, J.** This action is brought by the Union Ferry Co., owners of the ferry-boat *Manhasset*, against the steamship *Favorita*, to recover damages for injuries sustained by their ferry-boat in a collision with the steamship, which occurred on the afternoon of the 14th of April, 1865.

At the time of the collision the weather was clear, with a fresh breeze from the S. S. W. ; and the tide was ebb. The steamship was proceeding up the East River to her berth at 12th Street, New York, and the ferry-boat was on a trip from her Main St. slip on the Brooklyn side, to the Catharine St. slip on the New York side. The time of the collision was between three and four o'clock in the afternoon. The place of collision was off the Main St. slip.

The allegations of the libel filed in behalf of the Ferry Company are, that the ferry-boat was detached from her fastenings, and proceeded to the mouth of the slip, when the pilot and those in charge perceived the steamship proceeding up the river on a line across the front of said slip; and at about right-angles with the course of the ferry-boat, near to the Brooklyn shore, and at such a distance therefrom and from the ferry-boat, that it would not be practicable for said ferry-boat to cross the bows of the steamship, but to avoid a collision it became necessary that the ferry-boat should pass to the left of the steamship, and between her and the Brooklyn shore. That the pilot of the ferry-boat, immediately on discovering the steamship, reversed his engines, and also gave two blasts of his whistle, "to notify said steamship that said ferry-boat would so pass to the left of said steamship, and between her and the Brooklyn shore, and that said steamship should pass to the left of the *Manhasset*." That it thereupon became the duty of the steamship to sheer toward the New York shore; but the steamship disregarding the signal, and making no response thereto, sheered toward the Brooklyn shore,

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The Steamship Favorita.

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making it impossible for the ferry-boat to pass between the steamship and the Brooklyn shore ; and by reason of her paying no attention to the signal, and of her being sheered toward the Brooklyn shore, she collided with the ferry-boat, striking her just forward of the port wheel.

This statement of the movements of the ferry-boat challenges attention at the outset, as involving a departure on the part of the ferry-boat from the general rule which requires that when steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other, and the other shall keep her course. (Regulations of 1864, Art. 14-18.) According to this rule, it was the duty of the ferry-boat to keep her course, and the responsibility of avoiding her devolved upon the steamship. But according to the libel, the persons in charge of the ferry-boat, immediately upon discovering the steamship, assumed to determine the method by which collision was to be avoided, and stopped and backed, with the design of passing the steamship to the left, and between her and the Brooklyn shore. Under this libel, the burden must be considered to be upon the ferry-boat to justify her action, and to show that the course she so marked out for the two vessels was the proper one, and necessary to avoid immediate danger. This burden has been assumed, and in support of the averments in the libel, the persons in charge of the ferry-boat, together with pilots from other ferry-boats in the neighborhood at the time of the collision, have been produced, who concur in expressing the opinion that the action of the ferry-boat in stopping and backing was proper, and apparently necessary to avoid collision with the steamship as she was coming. It is to be noticed, however, that some of these witnesses produced by the libellants, put forth this opinion with little confidence. Thus the pilot of the ferry-boat himself says, "had we kept on, and the Favorita not changed her course, there

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The Steamship Favorita.

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would have been a collision the same—can't tell whether the Favorita could have sheered enough to Brooklyn to clear me—don't think she could at the speed she was going." Conklin, a passenger on the ferry-boat, and who saw the movements of both vessels, is not asked on this point; while Cole, a pilot called by the libellant, who was on a ferry-boat bound to the Fulton Ferry slip, says, "Don't hardly think the ferry-boat could have cleared her by going on."

As against these opinions, and in favor of the allegation of the answer, that the ferry-boat could have and would have passed in safety had she kept her course, the claimants produce the persons in charge of the navigation of the steamship, and also three persons who were standing on the forward part of the steamship from the time the ferry-boat appeared. These three witnesses, Mr. Erastus W. Smith, Mr. T. F. Secor, and Mr. Daniel D. Westervelt, are persons acquainted with the harbor and with the capacities of vessels. They were in no way responsible for the management of the steamship, and they were watching the movements of the two vessels with care. The statements of such witnesses upon a question like this, seem to me to be entitled to great weight. All these persons concur with the master, pilot, and mate of the steamship, in a positive opinion that it was not necessary for the ferry-boat to stop to avoid danger; but on the contrary, that the steamship could have passed under her stern in safety had the ferry-boat kept on, and that her failure to keep on was the cause of the accident. The statement of Mr. Secor is emphatic; he says, "I say, and did say at the time, that had the ferry-boat kept on we would have gone clear under her stern—no doubt of that;" and several other of the witnesses are equally positive. The weight of opinion, therefore, of those who saw the occurrence, seems to me to be strongly against the ferry-boat upon this point.

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This opinion is confirmed by facts proved in the cause relative to the manner in which the two vessels came together. The ferry-boat, as it appears, was struck not over eighty feet from the Brooklyn end of the boat, and when struck she had stopped her headway, and was moving back. How far she had backed is not clear from the evidence. The pilot estimates the distance as not over ten feet. Mr. Westervelt thinks she backed one or two lengths. Mr. Smith says more than half a length; but whether the distance she backed be ten or three hundred feet, it is manifest that the time necessarily occupied in stopping and backing and getting sternway, was sufficient to have enabled her, had she kept on, to have passed more than eighty feet further to west, and so to have been beyond the track of the steamship. This is still more manifest if the position of the steamship at the time the ferry-boat stopped is correctly given by the pilot of the ferry-boat. He places the steamship at that time off the bulkhead next above the Fulton Ferry slip, and while the steamship, endeavoring to stop as she was, would pass from this point to the place of collision off Main St. slip, the ferry-boat would certainly have passed more than eighty feet, and beyond all possibility of contact with the steamship.

From the weight of opinion of persons competent to judge, and who were present, as well as from the position of the vessels and the manner of the blow, I conclude, therefore, that if the ferry-boat had kept on her course, the steamship would have avoided her, and that she must be held guilty of fault in determining to pass to the left, and in stopping and backing when she did.

It was urged in argument on behalf of the ferry-boat, that even if the position of the two vessels was such that the steamship could have passed astern of the ferry-boat without danger had the ferry-boat kept her course, yet the ferry-boat having proposed to pass to the left by giving two whistles, and the steamship having concurred



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by giving no dissenting whistle, the steamship must be held exclusively responsible for the manœuvre; but an answer to this is found in the fact clearly proved by the libellant's witnesses, that the determination of the ferry-boat to pass to the left was made and acted upon by her before she blew her whistle. She gave the steamship no opportunity before she took her course, either to assent or dissent, and her whistles, blown after she had stopped and reversed, amounted under the circumstances to a mere notification of what had been already seen by those in charge of the steamship, that she was stopping and backing. Dissent by whistles at that time would have availed nothing, for it was too late for the steamship to break her sheer and attempt to pass to the left.

The fault of the ferry-boat in stopping and backing as she did is more apparent when it is considered that she moved out of her slip at full speed, and passed a sufficient distance into the open river, before she stopped, to fairly warrant the persons on the steamship in concluding that she intended to keep her course, and that when the pilot stopped and commenced the movement of passing to the left, or perhaps more strictly prepared to commence a movement to the left,—for there is no evidence that he did more than stop and back,—the steamship had already ported her helm, and was then sheering towards Brooklyn to pass under the stern of the ferry-boat. That this is so, appears by testimony furnished by the libellant. Conklin, a passenger on the ferry-boat, states that after going out of the slip he left the main-deck and proceeded to the centre of the boat, and then passed up to the upper deck on his way to the pilot-house; that after he reached the upper deck the pilot rang his bell; that then, when he for the first time saw the steamship, she had “a pretty rank sheer in shore.” Thomas, the lookout on the bow of the ferry-boat, states that he did not see the steamship, although in plain sight from the

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time he reached the mouth of the slip, until the stern of the ferry-boat had passed fifty feet beyond the slip, and that the ferry-boat "went out about half a minute more before the pilot rang the bell," and the steamship, he says, was then sheering in towards the Brooklyn shore. Cole, a pilot also called by the libellant, thinks the ferry-boat when struck was outside of the eddy. Of the witnesses called by the respondent, Mr. Secor is very clear upon this point. He says he saw the ferry-boat as she appeared coming out of the slip; that she continued to come out for some little space; that he stepped to larboard to satisfy himself that the engine of the steamship was working back, and saw that it was; that he then went to the bow, and when he got there the ferry-boat was still on her course, and a second or two afterwards she stopped. According to the evidence, then, I think it cannot be doubted that stopping the ferry-boat when he did was a manifest mistake on the part of the pilot of the ferry-boat. If the proximity of the steamship was such as to render it necessary to disregard the general rule which required him to keep on, the time to depart from the rule was when the steamship first came in sight. Had the man, who was stationed on the bow as a lookout, reported the presence of the steamship as soon as the bow of the ferry-boat passed the mouth of the slip, and the ferry-boat been then stopped and backed, all danger would have been avoided. If the steamship was then seen, the action of the pilot in moving on his course and out into the river shows that he then determined that a departure from the rule was not necessary to avoid danger. If the steamship was not then seen by the pilot, there was great carelessness on the part of the ferry-boat in not keeping a better lookout. The tide was low, and the slips and vessels at her lower pier prevented her pilot from seeing below the slips until the boat reached nearly or quite to the end of the piers. Great caution was therefore required in passing out. The boat should have been

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well in hand and a careful watch kept, so that the presence of a vessel in the river below would be seen at the earliest possible moment, and then if proceeding on her course would involve danger, she should have been at once stopped and backed. Instead of pursuing this cautious course, the ferry-boat, as her own witness proves, passed out of the slip at full speed, and was fairly on her course and in the river before the lookout discovered the steamship; and then, apparently not noticing that the steamship had already taken a sheer to pass under her stern, her pilot, without warning by whistles or otherwise, stopped and reversed his engine. The safety of the persons who are compelled to cross these ferries, requires that such lack of care should be condemned.

There remains to consider whether the steamship was guilty of fault. Two faults are charged: first, that she did not stop and back in time; second, that she disregarded the law of the State which requires all vessels navigating the East River to keep in the middle of the stream. As to the first-mentioned fault, I do not think that it is made out. The evidence shows beyond controversy that the steamship stopped and reversed as soon as, if not before, the ferry-boat was seen to stop, and the requirements of Art. 16 of the Regulations of 1864 would be fulfilled by stopping then, for not till then was there any serious danger of a collision. Indeed, the testimony of Mr. Secor before alluded to, is strong evidence that the steamship stopped before the ferry-boat did, and as soon as the ferry-boat appeared at the mouth of the slip. I have no difficulty, therefore, in holding that the "Favorita" was free from fault in this respect. As to the remaining fault charged, that the Favorita was being navigated too near the Brooklyn shore, there is perhaps room for doubt; but after full examination of the evidence, I am satisfied that she must be held guilty of fault in this particular. I fully agree with the counsel for the claimants, that where the steamship was, below

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the Fulton Ferry slip, is of no consequence, and I am moreover satisfied that owing to the fact that at the Fulton Ferry slip the river turns, and above that slip the shore bends rapidly to the eastward—even if it be conceded that the steamship, when she passed the Fulton Ferry slip was within two hundred feet of it, as claimed by the libellant, and that without excuse—still she could not for that reason be considered guilty of a fault which conduced to the collision, because the course she was then on as she came up to the bend, if maintained, would carry her, when she had passed the bend, away from the Brooklyn shore and towards the middle of the river, and would have given time and space to pass on either side, and without risk of collision of a ferry-boat coming out of the Main St. slip. But a consideration of all the evidence satisfies me that the steamship, tempted doubtless by the eddy, instead of taking a straight course from off the DeForest dock, and so bearing toward the middle of the river, as for all that appears here she could have done, followed the trend of the river after passing the Fulton Ferry slip and before she ported to avoid the ferry-boat, which, according to the testimony of her pilot, as well as that of Mr. Smith and Mr. Secor, was when she was half way between the Fulton Ferry slip and the Main St. slip. The testimony of many witnesses, some called by the libellants and others by the claimants, shows that when the ferry-boat appeared at the mouth of the slip, the steamship was much nearer to her than she could have been had she kept as far out as a straight course from the Fulton Ferry slip would have carried her. They were then so near each other that the engine of the steamship had only time to make one turn back before the blow. The estimated distance given by some of the witnesses for the libellant tends to confirm this conclusion. Thus McGinn, the pilot of the steamship, puts his vessel at three hundred feet out from the Fulton Ferry slip when he passed that point, while Mr. Secor places her when half way between

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the Fulton Ferry and Main St. slip at two hundred or two hundred and fifty feet off the piers. These distances, if they are to be relied on, would indicate clearly that the steamer had followed the trend of the shore. That this was so seems further to be indicated by the manner of the blow, which was nearly at right angles. If the steamship when she ported her helm to avoid the ferry-boat had been any great distance out, she would, before reaching the point where she struck the ferry-boat, have swung so far as to make the blow much more oblique than it was. This conclusion, it should be noticed, is not in conflict with any evidence given by those in charge of the steamship as to the course followed by that vessel after passing the Fulton Ferry. They give estimates of distance which would indicate no turning of the bend, but they do not say that they kept a straight course, and give no reason for not heading towards the middle of the river after passing the Fulton Ferry slip. After seeing the ferry-boat, the steamship properly ported and then rapidly neared the Brooklyn shore; but before she saw the ferry-boat, and while passing from the Fulton Ferry to the point where she saw the ferry-boat, she must have kept along instead of away from that shore, and so found herself in close proximity to the ferry-boat when it first appeared. This proximity may well have tended to confuse the pilot of the ferry-boat, and so have conduced to the error he made. It certainly gave no opportunity to make even a slight allowance for any difference of opinion as to distance, or for any error of judgment on either side. Such a sudden approach to a vessel coming out of the piers is precisely what the statute was intended to prevent. The safety of the navigation in this crowded port requires that the statute be rigidly enforced, and that every vessel which meets with a collision while navigating in violation of it, should be required to show satisfactorily that such violation was not a cause of the accident. The respondents have

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The Schooner Rainbow.

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failed to do this, and the steamship must therefore be held in fault as well as the ferry-boat.

The damages will accordingly be apportioned, and a decree entered to that effect.

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MARCH, 1866.

EDWIN P. TREAT *v.* THE SCHOONER RAINBOW,  
AND JACOB E. DODGE.

PRACTICE.—POSSESSORY ACTION.—CLAIMANT'S MOTION TO BOND  
BEFORE ISSUE JOINED DENIED.

Where a possessory action was brought by the owner of seven-eighths of a vessel, and the master, in possession and owning one-eighth, applied for leave to bond the vessel before filing his answer, and while the Court was sitting to dispose of the admiralty calendar;

*Held*, that without passing upon the merits, the Court would deny the motion.

A motion by the defendant, to bond in a possessory action, is not ordinarily entertained on affidavits, before issue joined.

Where no delay is likely to attend the disposal of such a case upon the merits, the reason for a delivery upon bail fails.

This was a motion on the part of the defendant in a possessory action to be allowed to take possession of the vessel upon a stipulation for value.

The vessel was seized on the first day of March, by virtue of process issued upon the prayer of the libellant, who alleged in his libel that he was owner of seven-eighths of the vessel, and that the defendant, who had theretofore been master of her, refused to deliver her to him, although required so to do. No answer had been filed by the defendant, but this application was made upon his affidavit that he was owner of one-eighth of the vessel; that by an agreement made between him and a former owner of the remaining seven-eighths he was to

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The Schooner *Rainbow*.

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be continued master for the period of a year; and that the present owner sought to remove him before the expiration of the year, and while he was in the prosecution of a voyage undertaken before notice of dismissal.

*Messrs. Scudder & Carter*, for the motion, cited the following authorities: 1 *Dunlap*, p. 175; The New Draper, 4 *Ch. Rob.* 225; The See Reuter, 1 *Dod.* 22; The Kent, 32 *Law Journal*, 105; 1 *Parsons' Mar. Law*, 389, 390; *Abbott on Ship.*, p. 167; 1 *Lush.* 495; 7 *Cow.* 670; 5 *Wend.* 315.

*Messrs. Benedict, Burr & Benedict*, in opposition, cited *Montgomery v. Wharton*, *Bee's Rep.* 388; *Boulay-paty*, Vol I. p. 332 and 334; The Johan and Siegmund, *Edwards*, p. 242; 2 *Pet. Ad.* 397.

BENEDICT, J. Without now passing upon the questions argued by the counsel for the defendant, and which relate in great measure to the merits of the action, I am of the opinion that the motion must be denied, and for two reasons.

In the first place, the motion is premature, no issue having been joined. In possessory actions, an application for delivery on bail by a party who has not yet answered is not ordinarily entertained. Such was the ruling in the strongly contested case of the *St. Thomas*, decided in 1851. Upon a like application in that case, Judge Betts says: "If the claimants have any equity to prevent the allowance of the decree prayed for by the libellant, it must be brought before the court by answer. It is not competent to them to meet the merits of the libel by motion founded upon affidavit. This, in effect, would lead to a decision of the gist of the case upon matters outside the pleadings."

Another reason why the application here made should not prevail at this stage of the case is, that the Court is

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The Schooner Rainbow.

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now sitting, and has the admiralty calendar before it. The cause can, therefore, be put at issue and tried forthwith. When no delay is likely to attend the disposal of the case upon its merits, the reason for a delivery upon bail fails. Indeed, it has often been denied where the reason existed. Thus, in the case of the bark Onyx, decided by the same experienced judge, it was held, "That as there appears probable cause for maintaining the action upon the merits of the libel, the court will not intercept the appropriate remedy to that right by a preliminary order placing the property in the hands of the adverse claimant, and giving him the whole advantage of such possession. \* \* \* The substitution of stipulations for the vessel would not place the libellant on the same footing of right as that of her custody by the court, for if they are entitled to the possession *in specie*, that would not be secured to them by force of the stipulation, and if there be an entire equality of interest between the parties, the claimant cannot be allowed to secure to himself the advantage of possession and use of the vessel by giving a stipulation for her value."

The cases cited were cases of applications for delivery on bail, by a claimant in possession and owning one half of the vessel. The reasons above given seem to me to be conclusive in a case like the present, where the claimant is a minority owner, and no delay need be experienced in disposing of the case upon the merits.

The motion is therefore denied, without prejudice to a second application, in case of necessary delay in bringing the case to a hearing.



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The Schooner Othello and Cargo.

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**DAVID G. CARTWRIGHT AND FREDERICK H.  
HARRISON v. THE SCHOONER OTHELLO AND  
CARGO.**

**ARREST OF GOVERNMENT PROPERTY.—BOTTOMRY BOND.—VESSEL CHARTERED TO THE GOVERNMENT.—MOTION TO VACATE PROCESS.**

Where a vessel under charter to the United States, whose owners were to victual and man her, took on board a load of property captured by the army of the United States to bring it to New York, and meeting with disaster on the voyage, her master took up money on a bottomry of the vessel and cargo, and on her arrival in New York a libel was filed to enforce the bottomry bond, and the vessel and cargo were seized by the marshal under the process, and no appearance being entered for either vessel or cargo, the District Attorney of the United States, before the return of the process, applied on affidavit for an order directing the release of the property and vacating the process, on the ground that Government property was not subject to the process of the court—*Held*, That whether the vessel could be considered as Government property under the charter was doubtful, and that such a question should not be disposed of before appearance, and on motion.

That though the cargo was Government property, it had been put by the Government into the custody of the master of the vessel, and it was doubtful whether granting the order would put the Government into possession of it.

That the law of the case ought to be determined upon a hearing on issues properly and formally framed, instead of upon motion.

This was a motion to vacate the process issued in the cause. It appeared from the papers read upon the motion that the schooner Othello was chartered by her owners to the Government of the United States, at the rate of fifty dollars per day, for an indefinite period of time, the owners to victual, man, and navigate the vessel, and transport therein such property as might be tendered by the Quartermaster of the United States Army. According to the terms of the charter party, the vessel was to be kept fit for service by her owners, and all sea risks to be borne by them. Under this charter,

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The Schooner Othello and Cargo.

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and while under the command and in the possession of a master not an officer in the service of the United States, but appointed and paid by the owners, she set sail from Wilmington for New York, laden with a cargo of property which had been captured by the army of the United States. In the prosecution of her voyage, she met with disaster at sea, and was compelled to put into St. Thomas for repairs. While there, the master, in order to raise money necessary to repair and enable him to prosecute his voyage, executed a bottomry bond in the usual form upon both vessel and cargo, to secure the sum of \$15,535, alleged to have been borrowed by him for the purposes aforesaid. The vessel thereafter proceeded upon her voyage, and arrived in this port, when the bond not being discharged, a libel was filed in this Court to enforce it, and the vessel and cargo taken into custody by the marshal under the admiralty process issued according to the prayer of the libel.

Before any appearance or claim for either vessel or cargo had been entered, the District Attorney, on behalf of the United States, before the return day of the process, moved, upon affidavits, for an order directing the discharge of the property from custody, and vacating the process, on the ground that the cargo was conceded to be the property of the United States, and that by virtue of the peculiar provisions of the charter party referred to, the vessel also was, in law, Government property, and as such not subject to the process of the Court.

For the United States, *B. D. Silliman, Esq., United States District Attorney.*

For libellants, *J. J. Ridgway, Esq.*

BENEDICT, J. According to my present impression, the view taken by the District Attorney in regard to the vessel can hardly be maintained. But however that may

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The Schooner Othello and Cargo.

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be, I am clearly of the opinion that such a question as is raised by the facts above narrated should not be finally disposed of before appearance and upon a motion. It does not yet appear that the owners of the vessel, who are the parties responsible for that portion of the advances chargeable to the ship, will not come forward on the return of the process and claim their property, while the interest of the Government in the controversy, so far as regards the vessel herself, is certainly very slight, for it appears that the hire of the vessel had been suspended by the Quartermaster before the seizure of the vessel, because of a refusal of the master to deliver the cargo.

As to the cargo, the facts are somewhat different, for that is conceded to be the property of the United States. It is property, however, in no way connected with any active operations of either army or navy. It was committed to the custody of the master of this vessel, to be transported by him to this port. While in the prosecution of the voyage, the master, by reason of disaster at sea, has been compelled, in a foreign port, to pledge the cargo to these libellants, by way of bottomry; and upon the termination of the voyage, before any delivery of the property to any officer of the Government, and while it still remained in the custody of the master, it was seized by the marshal, by virtue of process issued out of the Court of Admiralty, in an action brought to enforce payment of the bottomry loan; now, inasmuch as it appears that previous to the seizure by the marshal, the Government had failed to obtain possession of the property from the master of the vessel, the order applied for here would not necessarily have the effect to put the Government in possession. If such would be the effect of an order releasing the property from the custody of the marshal, because of the great hardship of thus, by an interlocutory order, made on motion, without the interposition of claim or answer, depriving the libellants of any opportunity to derive any advantage from their

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The Steamer City of Dublin.

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bottomry bond, and possibly of any opportunity to secure the opinion of an appellate court, I should feel very unwilling to grant the application, unless I felt satisfied that the law of the case was free from all doubt. What the law of the case is, should, I think, be determined in this case, as has been done in other cases where property of the United States has been seized by the marshal, in private suits, (*The Thomas A. Scott, Shipman, J.*) upon a hearing upon issues properly and formally framed.

The application must, therefore, be denied, both as to vessel and cargo.

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APRIL, 1866.

EDWARD ROWE *v.* THE STEAMER CITY OF  
DUBLIN.

COMMON CARRIER.—LOSS BY DELAY IN DELIVERY OF CARGO.—NEGLIGENCE.—DAMAGES.—LOSS OF MARKET BY THE CLOSING OF THE SEASON.

Where a case, containing braid, &c., for the manufacture of ladies' hats, was shipped on a steamer, but was not delivered to the consignee for nearly a month, notwithstanding his repeated demand of it, having been sent to a public store as a case without marks, and it appeared that the outside covering, which was properly marked, by some means was removed from the case while in custody of the ship, and the case itself was not marked, but the delivery clerk saw a loose covering on the wharf, and, when the consignee applied for the case, knew that a case had been sent to public store, which he was satisfied was the case applied for, but did not communicate the fact to the consignee.

And where during the delay the season for selling the goods to the trade ceased and the goods were thereby diminished in value—

*Held*, That on the evidence the delay in the delivery was attributable to negligence on the part of the vessel.

That on the evidence it was not negligence to have no marks on the case itself.

That the vessel was chargeable with the damage occasioned by the delay and that the diminution in value was properly chargeable as an item of damage.

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The Steamer City of Dublin.

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This action was brought to recover damages for undue delay in delivering a case of merchandise shipped in the steamer City of Dublin, consigned to the libellant. The steamer arrived in this port on the 17th of September, and proceeded at once to discharge. The case in question, however, was not delivered with the rest of the cargo, and, on application of the consignee, was reported not to be on board. As the manifest showed that it had been actually shipped, it was supposed to have been misdelivered, and repeated applications were made on behalf of the consignee to the agents of the vessel to find and deliver it. After considerable delay, the consignee was informed that a case, supposed to be the one in question, was at a public store, where it had been sent by the discharging clerk, as a case without marks. Finally, about the 14th of October, the consignee was informed by the agents of the vessel that the case was at the bonded warehouse, No. 16 Washington Street, and he was invited to examine and identify it, that it might be delivered, if it proved to be his case. The case was identified on the same day, and on the same day transferred to the appraiser's office, and, after the usual delay there, it was finally received at the libellant's warehouse on the 20th of October, in like good order as it was when shipped, save only that its canvas covering was gone and it was consequently without marks. Had the case been delivered in the ordinary manner, it would have been received at the warehouse by the 27th or 29th of September.

The libellant proved that the case contained braid, composed mostly of gold tinsel, designed for the manufacture of ladies' hats, and that it was imported by him to be sold at wholesale to the trade; that no change in the value of the article arose till the 5th of October, when its value was diminished over fifty per cent., by reason of the fact that the season for disposing of the article to the trade then ended; and this diminution of value he sought to recover as damages.

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*G. M. Speir, Esq.*, for the libellant, after arguing the disputed questions of fact as to the delivery of the box, proceeded to argue—

(1.) *Prima facie*, the ship having signed the bill of lading, containing marks of identification, the *onus*, at least, was on the ship to show that in some way the consignor or owner was at fault. There was no concealment, as in the case of goods injured or falling off in quantity, where the shipper cannot know the contents. In 12 *Howard U. S. R.* 272, Nelson, J., says, that when a bill of lading contains the usual clause, "shipped in good order," and adds, "contents unknown," the acknowledgment of the master as to the condition of the goods when received on board, *extends to the external condition of the cases*, excluding any implication as to the quantity or quality of the article, &c. See also Ch. J. Shaw, in *Hastings v. Pepper*, 11 *Pick.* 43, to the same effect. These authorities bind the ship, by the bill of lading, to the fair external condition of the box or case containing the goods.

The bill of lading would be proof of delivery by the ship in both cases, and in order to escape responsibility, in the one case it would be necessary to show that she never received the goods, and in the other that she never detained them. See *Bishop v. Mersey & Clyde Navigation Co.*, cited in Pritchard's Admiralty Digest, a Scotch case.

(2.) The respondent is clearly liable for damages for the detention of the goods, provided the law gives the libellant a claim against a carrier for mere detention by reason of the goods depreciating in value while thus detained.

The General Term of the Supreme Court of the Seventh District in this State, held that the carrier is not entitled to damages for depreciation in the value of the goods for mere detention; (*Jones v. New York & Erie R. R. Co.*, 29 *Barb.* 633. Opinion by Marvin, J.,) while the General Term of the Supreme Court in the

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Sixth District hold that such damages are recoverable. (Kent *v.* Hudson River R. R. 22 *Barb.* 278. Opinion by E. D. Smith, J.) The only case I can find upon this precise point is in 9 *J. Scott*, N. S. 632, Wilson *v.* The Lancashire & Yorkshire Railway Co. cited in 99 *Eng. Com. Law R.* 631. In that case, all the judges concur in the rule, that the plaintiff was not entitled to such *profits*, as he might have made upon receiving the cloth in due season, by reason of *remoteness*, but they all agree that deterioration in quality may be taken into account in estimating damages, also diminution of quantity, and they see no reason why a loss in the *exchangeable* value of the goods should not be taken into the account.

In the opinion of Williams, J., the case before this Court is put by hypothesis, and it is not possible to conceive of a case more in point.

It is to be observed that all the judges in this last English case have adopted the rule laid down in *Hadley v. Baxendale*, 9 *Exchequer R.* 341, and that the only additional adjudication we have had on this subject, so far as I have been able to ascertain, is found in *Hamilton v. McPherson*, 28 N. Y. R. 72, where Judge Selden, at page 77, adopts the rule as laid down in *Hadley v. Baxendale*. Although this case decided by Judge Selden, certainly one of our ablest judges, is not decisive of the point in question, it shows a concurrence with the rule adopted in England, and leads us to believe that that rule will yet be adopted by our court of last resort in this State.

There are many reasons why the commercial community should be indemnified for such loss. Among them I may mention the importance of the prompt execution of orders to meet a fluctuating market, where competition constitutes the very life of trade and success; the many expeditious modes of conveyance among common carriers, and the readiness of merchants who employed them, to pay the highest price to secure goods any merchandise, on foreign orders, by the quickest dispatch.

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The carrier, therefore, whether by rail or vessel, will receive the greatest patronage who discharges his plain duty in these respects with the greatest fidelity.

It is, then, but common justice, that any damage sustained by any faulty negligence in the performance of this duty should be made good to any one who may sustain a loss thereby.

*J. W. Gerard, Jr.*, for the respondents, after arguing that the failure to mark the case itself, was the cause of the whole delay, proceeded :

(1.) It is a well *settled rule* that where the *law* creates a duty or charge, and the party is disabled from performing it, and has no remedy over, then the law will excuse him.

The cases state that the duty of a *carrier to carry and deliver* safely is **ABSOLUTE**, but to deliver within a reasonable *time* is merely **RELATIVE**, and dependent upon the *circumstances* of the case. The principle upon which the *extraordinary responsibility* of common carriers is founded, does not require that that responsibility should be extended to **TIME**. *Harmony v. Bingham*, 12 *N. Y.*, 99.

When the goods are actually *delivered*, and no *time of delivery* has been specified, carriers may excuse delay in delivery by *accident* or *misfortune*, although not inevitable or by the act of God. *Parsons v. Hardy*, 14 *Wendell*, 215; *Wibert v. New York & Erie R. R. Co.*, 12 *N. Y.*, 245; *Blackstock v. Same*, 1 *Bosw.* 77; *Dows v. Cobb*, 12 *Barb.* 310.

The discrepancy of opinion on the question of damages for delay, alluded to by libellant's counsel, has been set at rest by the Court of Appeals in the case of *Wibert v. New York & Erie R. R. Co.*, (12 *N. Y.*, 245.) The English case quoted by him from 9 *Scott*, whatever its merits, is of no authority here, and in *that* case there was a delivery at the wrong place, and a violation of the substance of the contract and instructions.



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The carrier, the owner not being found, should properly place the goods *in store*, as was done in this case. *Fiske v. Newton*, 1 *Denio*, 45.

(2.) Damages, which are the *natural* though not the *necessary result* of the injury, are termed *special damages* and *must be averred in the complaint*. *Vanderslice v. Newton*, 4 *Comstock*, 133 ; *Burgard v. Burkhalter*, 2 *Barb.* 525 ; *Solms v. Lyas*, 16 *Abbott*, 311.

Here the goods were not *injured*, but there was a *change of fashion*, not a *necessary result* of any action of the vessel, but an outside caprice.

If *not* stated in the complaint, the plaintiff cannot prove such *special damages* on the trial. *Low v. Archer*, 12 *N. Y.*, 282 ; *Moloney v. Dows*, 15 *Howard's Pr. R.*, 265.

Therefore, *no special damages* can be recovered here because *not averred*, and no *other damage* because *there was none*.

The Court, if they *should* find liability, should state for what period the damages should be assessed, as the delay was not in any event all the result of the action of the respondents, but of the libellant's clerks, who by the testimony appear to have been dilatory.

Whether the libellants and their employees were dilatory at the *first* or last *part* of the month makes *no difference*, as the *sooner* steps had been *initiated*, the sooner the recovery of the box would have been had and *ended*.

(3.) Possible or probable *profits* are not to be estimated on the question of damages.

It would be a calculation upon *conjectures* and not upon *facts*.

The subject would be utterly uncertain, and a uniform *interest* has been allowed in its place.

*Speculative profits*, or *accidental* or *consequential* losses cannot be estimated as damages. *Hamilton v. McPherson*, 28 *N. Y.* 72.

The fashion of gold tinsel stuff or its decline was not contemplated by the contract of carriage.

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(4.) The loss by the decline in prices was not a *proximate* consequence of the delay. Nothing can be allowed as legal damages, that is not the natural and proximate consequence of the act complained of, particularly as there was no time fixed for the delivery, and it was not a part of the contract.

So held in the leading case on the point. *Wibert v. N. Y. & E. R. R. Co.* 19 *Barb.* 36, 48, which was a case for the detention of butter, held that parties could not recover for an enhanced price. See, also, *Jones v. N. Y. & E. R. R. Co.*, 29 *Barb.* 633.

BENEDICT, J. Upon the facts in this case, the libellant insists that the delay in the delivery of the package, was caused by the neglect of the carrier; while the respondents insist that the delay arose in the first instance, from the neglect of the freighter, in not having marks put upon the box itself as well as upon the covering, in which case it would have been delivered instead of having been sent to public store; and that as soon as the case was known to be missing, it was traced and delivered without undue delay or neglect on the part of the vessel. The proofs introduced by the respective parties, lead me to the conclusion that the delay in the delivery of this case must be held to have arisen from the neglect of the carrier. The case, as the bill of lading shows, was plainly marked upon its covering when it was shipped, and it was also described by measurement. Cases of this kind, the dock agent of the vessel thinks, are usually marked upon the box as well as upon the covering, but the weight of evidence is that marking the covering is the more usual and a proper method of marking such merchandise. There is no evidence that the covering was insufficient for the ordinary wear and tear of such a voyage, and no evidence going to show how it came to be removed, as it was while in custody of the vessel. It does appear in evidence, that while the vessel was being

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discharged, a loose covering was seen by the delivery clerk on the dock, lying about the vessel, but no examination was made of it to ascertain what marks it bore; and it also appears that the case in question was the only case of merchandise found to be without marks. An examination of the loose covering would doubtless have insured a delivery of this case with the rest of the cargo. Furthermore, the delivery clerk of the steamer says that the returns of the discharge of the vessel, made to him three or four days after her arrival, disclosed to him the fact that a case of merchandise had been sent to the public store as without marks, and that when application was made on behalf of the libellant for the case in question, he was satisfied that it was the one returned as sent to the public store. This, on the clerk's own statement, was within seven days after the arrival of the vessel, and yet he did not inform the libellant of the whereabouts of his case until some ten or twelve days after that. It seems to me that the interests of both merchants and ship owners require greater attention to missing cargo than is here shown. The evidence is that the case could have been found, examined and identified, and delivered within a day or two by prompt attention, and such attention the ship owner was bound to give. Upon this branch of the case my conclusion, therefore, is, that there was such neglect on the part of the carrier in regard to this shipment as to make the vessel responsible for any damages caused by the undue delay. This conclusion in no way conflicts with the doctrine laid down by the New York Court of Appeals, in the case relied upon by the respondents. (*Wibert v. New York & Erie Railroad Company*, 12 N. Y. 245.) That was a case of failure to transport within the ordinary time of running a freight train, and the cause of the delay was that the amount of merchandise offering for transportation at the time, was beyond the capacity of the road to transport as fast as received, and the Court held that the carrier having pro-

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vided all the trains that could with safety be run upon the road, and having used all possible exertion to forward the merchandise, was not chargeable with neglect. Here the delay did not arise in the course of the transportation. That was duly accomplished. But after the merchandise had arrived at the place of delivery, and when there remained upon the carrier only the obligation to land and deliver, and when ordinary care on the part of the carrier would have insured the successful performance of his contract, the merchandise was sent to public store and allowed to remain there some twenty days before notice of its whereabouts was given to the consignee. No law laid down by the Court of Appeals in the case cited by the respondent would serve to excuse the carrier in a case like the present.

There remains the question whether it has been made to appear by the libellant that he has sustained any loss which can be recovered as damages caused by the undue delay. The respondent insists that the loss in value occasioned by the closing of the season, if proved, is remote and cannot be recovered as a damage caused by the failure of the carrier to deliver promptly, and to sustain this view the opinion of the Supreme Court of the State of New York in the case of *Jones v. The New York and Erie Railroad Company*, (29 *Barb.* 633,) is cited, while in support of his demand the libellant cites the opinion of the Supreme Court of New York in the case of *Kent v. Hudson River Railroad Co.*, (22 *Barb.* 288.) I do not consider it necessary, however, in the present posture of this cause, to pass upon the question which was raised and decided in these two conflicting cases, and which was also passed upon by the learned Judge Betts, in the case of the *Lexington*, where, in a similar action, the District Court of the United States gave a decree for the difference in the market price of some seed which had been stored by a carrier without notice of arrival to the consignee, and so not received until a delay

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of some days had arisen from what the Court, in that case, held to be a neglect of the carrier, for the evidence offered here presents a different question. The libellant in this case has not attempted to prove any variation of that market price proved in the cases above referred to, which would be dependent upon the quantity of the article in the market, the prospect of the crops, the price of gold, possibly even upon the changing phases of political and national questions, and various other contingencies which in a commercial centre go to change from day to day the selling price of many, if not most commodities. His proof here does not show that there was any such change of market price of the article in question during the period of detention ; but he proves that when the season ended, and not before, there was a diminution of value of over fifty per cent., the natural and ordinary trade in the article having ceased when the season terminated. In the cases above referred to, the market value of the butter, sheep, and seed in controversy there upon the day of arrival, was dependent upon many contingencies which do not present themselves in the present case. In those cases, the market value proved might have been affected by the arrival or non-arrival of the very parcels in question, the price might have gone up in spite of the delay, and so the detention been productive of benefit instead of loss to the freighter. In this case no possible advantage could accrue to the libellant by the delay. The arrival or non-arrival of this merchandise would not prevent the termination of the season, and with it the end of that demand of the trade, to supply which the article was imported. What the libellant claims here is, not a loss of profit, but that he lost the opportunity to dispose of his goods at all in the manner and for the purposes for which they were imported. The only circumstance which caused this loss was the lapse of time, extending beyond the season. Up to Oct. 5 there was no diminution of value. After that, the article had no

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exchangeable value in the ordinary course of trade, as an article required for the manufacture of ladies' hats, but was only valuable as an article to be held over to the next season, or to await the chance of finding an out-of-season customer. This diminution of value was a certain result of such delay in regard to an article like this; and I can discover no element mingled with the delay as a cause of the loss. It arose from the delay, and from nothing else, and was its natural and immediate result. A case very like the present is reported in 99 *Eng. Com. Law R.*, p. 641, (*Nelson v. The Lancashire and Yorkshire Railroad Company*, 9 *J. Scott N. S.* 632.) There the action was for undue delay in delivering a quantity of cloth, ordered by a manufacturer of caps, which failed to arrive in time to be made up so as to fill the orders of the season which his travellers had obtained; and the Court, while they disallowed all profit which would have arisen from the sale of the caps had they been made, allowed to the plaintiff the diminution of exchangeable value of the cloth caused by failure to arrive in time to be made up for the season. The case put by Williams, J., of an order of ribbons intended to be sold at a fashionable watering place, which should be delayed until the watering season was over, so that the opportunity of their sale is lost, and as their novelty and fashion are gone, they remain on hand materially diminished in value, seems to be on all fours with the case presented by the libellant. The case before me, therefore, as it now stands, I consider to be free from the objections raised by the respondents, and to disclose a positive loss to this libellant, which can be recovered in an action like the present, as the immediate result of the carrier's neglect. The decree must be for the libellant, with an order of reference to ascertain the amount of damage sustained. I do not consider that either party is concluded by the evidence given on the hearing, from introducing before the commissioner any evidence per-

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tinent to the question of damages, and intend now to do nothing more than declare the rule of damages applicable to the evidence produced before me.

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MAY, 1866.

## EZRA WHITNEY ET AL. v. THE STEAMBOAT EMPIRE STATE.

**COLLISION IN HELL GATE.—STEAMER AND SCHOONER.—BEATING OUT TACK.—STEAMER NOT STOPPING.—EVIDENCE.—STATEMENTS OF CREW.**

The schooner *Gold Fish* was coming through Hell Gate to New York, on an ebb tide, with a six-knot breeze from W.N.W. She stood over from Negro Point, close-hauled on her starboard tack, till near Hallett's Point, and then tacked off to the northward. Before going but a short distance, she was run into by the *Empire State*, which was bound from New York. The collision occurred in the afternoon.

For the steamboat it was urged: (1) That the schooner, after coming about, ought to have remained in the wind long enough to allow the steamboat to pass her. (2) That the schooner was negligent, in that after she came about she let her sheets flow, and remained in the steamboat's track. (3) That the schooner did not run out her tack towards Hallett's Point.

*Held*, That the circumstances make out a case where the burden of proof is on the steamboat to show by preponderating evidence that she was prevented from passing in safety by some fault in the management of the schooner.

That it was not the duty of the schooner to remain in the wind. What the law requires of a sailing vessel in a narrow channel is to beat out her tack, and having done so, to come about with all possible dispatch upon the other, leaving to an approaching steam vessel the responsibility of being in a position to enable her to do so without danger.

That though there may be cases where a departure from this rule would be justified, and even required, the present is not one. No sailing vessel in Hell Gate can be asked to check her headway to enable a steamboat to pass her at Hallett's Point.

That the weight of evidence is against the defence that the schooner's sheets were let loose. Testimony of the men on board the schooner, respecting their own

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acts, must be considered as outweighing the statements of persons from the steamboat.

That the rule requiring a sailing vessel to beat out her tack does not require her in all cases to go as near the shore as the depth of the water will permit, without reference to other exigencies. A schooner tacking above Hallett's Point is entitled to come about in time to insure avoiding the reef at the Point, and the place must vary according to the capacity of each vessel and the strength of the wind and tide.

That the fact that the answer when put in did not deny the averment of the libel that the tack was properly beat out, is to be considered on a conflict of testimony on that point, even though the answer was allowed to be amended on the hearing by inserting such a denial.

That evidence of conversations with the crew of the schooner is entitled to little weight in determining disputed questions of fact, especially where the statements are denied by the witnesses on the stand, and are inconsistent with the cotemporary act of demanding pay for their vessel.

That the steamer was in fault in not stopping in time, and that, having selected the most hazardous course, by not waiting till the schooner had passed her to the northward, and having failed of success in it, she must be held responsible for the damages.

The facts of this case sufficiently appear in the opinion of the Court.

For libellants, *Messrs. Benedict, Burr & Benedict.*

For claimants, *I. T. Williams, Esq.*

This action is brought by the owners of the schooner Gold Fish, to recover damages caused by the sinking of that vessel in a collision with the steamboat Empire State, which occurred at Hell Gate, in March, 1864.

The proofs presented by the respective parties, while they are conflicting as to some of the main features of the case, establish without serious conflict the following facts. The schooner was bound to New York, and reached Hell Gate about 4:30 o'clock, P.M., the wind blowing then a six-knot breeze from about W.N.W. and the tide running the strength of the ebb. The steamboat Empire State was proceeding from New York, and when above Blackwell's Island the persons in charge of her saw the schooner



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approaching the Gate, close-hauled upon her starboard tack, from Negro Point. The steamboat then sheered and proceeded on toward Hallett's Point, and when near the Point, the wheel of the steamer was put hard-a-port, in order that she might be on a swing to starboard when she should strike the tide at the Point, which, owing to the abrupt turn of the Gate there, flows rapidly past the Point, over toward Mill Rock, and at right angles with the channel below. No other change in the helm of the steamboat was made, nor was her engine then stopped, and accordingly the steamboat passed round the Point, swinging as she passed it, till she came head to the tide. While the steamboat was on the turn, the schooner was observed to be coming about. The engine of the steamboat was then stopped and backed, but before the vessel could get sternway on her she came in contact with the schooner, striking her on her larboard side, and cutting her down so as to make it necessary to run her ashore on Ward's Island, where, being loaded with lime, she took fire and burned up. These circumstances make out a case where the burden of proof is upon the steamboat, if she would avoid responsibility for the loss, to show by preponderating evidence, that she was prevented from passing this schooner in safety by some fault in the management of the schooner. This burden has been assumed, and it is contended that the proofs show that the schooner was in fault for not remaining in the wind after she came about long enough to have enabled the steamboat to pass by outside of her. There is evidence in the case indicating that this view of the duty of the sailing vessel was entertained by those in charge of the steamboat, and that, in choosing their course for passing the schooner, they relied in some measure upon the schooner's aiding them by remaining in the wind. Indeed, one of the witnesses greatly relied on by the respondent makes the failure of the schooner to do this his principal ground of objection to the navigation of the schooner. But this ob-

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jection rests upon a misapprehension of the duty of a sailing vessel under circumstances like the present. What the law requires of a sailing vessel in a narrow channel is to beat out her tack, and having beat it out, to come about with all proper dispatch upon the other, leaving to the steam vessel the responsibility of being in a position to enable her to do so without danger. This is the general rule, and although there may be cases where a departure from it would be justified, and even required, the present is not one. In the swift tide and dangerous channel of Hell Gate, no sailing vessel can be asked to check her headway to enable a steamboat to pass her at Hallett's Point. (See *Twibell v. Steamboat Keystone*, Nelson, J.)

This objection to the navigation of this schooner must therefore be overruled. The next objection taken by the respondent is that the schooner, after she came about upon her larboard tack, flowed up her sheets, and so remained, with her broadside to the steamboat, and directly in her course, when by properly handling her sails she could have gone on past the bows of the steamboat in safety.

A careful examination of the testimony offered upon both sides as to this point has satisfied me that the weight of evidence upon the point is clearly in favor of the libellants. The pilot and crew of the schooner are positive in their statement that the schooner filled away and kept full till the instant of collision, all the sheets except that of the gaff topsail being properly trimmed. This testimony being of the persons actually in charge of the sheets, and respecting their own acts, must be considered as outweighing the statements of persons from the other vessel. Moreover, the statement of the crew of the schooner is confirmed by the fact, which is nowhere contradicted, that the main and jib sheets were both made fast with an extra turn which was not intended to be unloosed in tacking, and which was not unloosed to make the tack in the present case, and which

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could not, without more delay than here appears, have been unloosed after the vessel came about head to the steamboat. In addition to this, it is to be remarked that the answer makes no allusion to any such fault in the navigation of the schooner, and that the testimony of the crew of the schooner, which was given before the point appeared in controversy, when examined is found incidentally to disprove the charge. I have no hesitation, therefore, in coming to the conclusion that the schooner cannot be held to be in fault in regard to the management of her sails after she came about.

The remaining fault charged upon the sailing vessel, and the one most strenuously urged, is that she did not beat out her starboard tack. The duty of a sailing vessel to beat out her tacks when meeting a steamer in narrow water, is unquestionable; but this rule does not require the sailing vessel in all cases to go as near to the shore as the depth of the water will permit, without reference to the other exigences of the channel. In beating through a passage like Hell Gate, tacks must be made with reference to the safe passing of points and shoals ahead, and when approaching Hallett's Point with a strong ebb tide, a sailing vessel is entitled to come about in time to insure avoiding the reef at that point, although she may not be at the time of tacking as near the Long Island shore as the depth of the water would permit her to go. The end of the southern tack of sailing vessels from Negro Point is therefore no fixed point, but must vary according to the capacity of each vessel and the strength of the wind and tide at the time. This being so, it seems clear that the opinion of those engaged in the navigation of the sailing vessel, who knew the capacities of their vessel, and can most accurately judge as to the effect which the wind and tide are having upon her, is entitled to more weight, as showing the proper place for the tack, than opinions formed by persons aboard a steamboat approaching from below. In this

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case the testimony of the persons on board the schooner is positive and emphatic that they proceeded as far upon the tack as it was safe for them to go. The schooner was in charge of a regular Hell Gate pilot of experience, and no circumstance is proved which would make any departure from this course necessary or proper, or which would be likely to lead to any error of judgment. The steamer was in full view, and there was nothing in her method of approaching the tide at Hallett's Point to indicate that she intended to pass to the southward of the schooner. No alarm upon the schooner at the time is shown. She had a fine working breeze, and, as appears in evidence, was a vessel which worked with unusual celerity. Moreover, the whole tack was necessary for her to insure the passage of the Gate, without reference to the presence of an approaching vessel. It would seem to be highly improbable that under such circumstances the pilot of the schooner would have thrown his vessel into the wind before his tack was accomplished, and when her destruction was almost certain to ensue. It would require a very strong array of evidence to satisfy the mind against the positive statements of the persons working the schooner, and against all the probabilities of the case, that so extraordinary a manœuvre was attempted by the schooner. The evidence introduced by the respondent upon this point I have examined with care. I find some of it positive to the effect that the schooner tacked in mid-channel; other portions of it I find are inconsistent with the testimony given by the libellants; and after giving to it all the weight to which it is entitled, it has failed to convince my mind that the management of the schooner was faulty in not beating out her tack. With regard to this fault also, I notice that the original answer filed in the cause made no mention of it, and did not deny the averment of the libellants that the tack was properly beat out; and although when the cause was called on for hearing, upon the application of the

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respondent, the answer was permitted to be amended by inserting a denial of this averment, so that issue is now properly taken upon this question of fact, yet in determining it, the circumstance that while it is now made the principal issue, no such fault was charged by the owners of the steamer when they swore to and filed their answer, is entitled to be considered. If the omission to beat out the tack was then deemed the great fault on the part of the schooner, it is difficult to account for its omission in the original answer, when the facts attending the collision were fresh in the recollections of all.

Looking at the whole case, my conclusion is that the collision in question was not caused by any fault of the schooner, but by the fault of the steamboat in not stopping in time to allow the schooner to beat out the tack and pass the steamer's bows in safety. The testimony of the pilot of the steamer shows this. He states that when he saw the schooner, he determined to pass to the northward of her, and expected her to tack to the southward of him as he was passing, and come out under his stern. The steamboat was accordingly sheered, but not stopped, below Hallett's Point, and when she struck the tide, in passing the Point, was allowed to take it more broadly upon her side than usual, which would have the effect to carry her further to the northward. The effort to time the speed of the steamer, so as to bring her opposite the schooner at the time of the tack, failed. The schooner, under the full strength of a powerful tide and full breeze, and being, as appears in evidence, an uncommonly quick worker, reached her place for tacking sooner than was anticipated, and when it was impossible for the steamer to pass her bows to the northward as had been intended. The engine was at once stopped and reversed, and with the helm hard-a-port, an effort was made to pass to the southward; but owing to the position which the steamer had assumed in the tide, she could not sheer rapidly to starboard, and before she had time to change

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her direction materially, the schooner was under her bows. Had the steamer taken up the tide in the ordinary manner, intending to pass to the southward of the schooner, it is quite possible, as the event showed, that she might have passed in safety, for a small sheer would have swung the steamboat sufficiently to have cleared the schooner. But however this may be, had the steamer stopped her engine before she began to pass the point, all possible danger of collision would have been avoided. It cannot be claimed that there was any difficulty in her stopping below the point; and if, as proved by some of the witnesses, and as conceded by the counsel of the respondent, the tack was made when the steamer was abreast of Flood Rock, it was clearly the duty of the steamer to wait a moment before attempting to pass the point. Having selected the most hazardous course, and having failed of success in it, she must be held responsible for the damages which ensued. In arriving at this conclusion, I have attached little or no importance to the great mass of testimony introduced in the case, relating to conversation had with the crew of the schooner after the accident. This description of testimony, although often proved in actions for collisions, has, in most cases, been held by the Court to be entitled to little weight, in determining disputed questions of facts appertaining to the navigation of the respective vessels; and where statements are denied by the witnesses upon the stand, and seem inconsistent with the cotemporary act of demanding payment for their vessel, I dismiss the evidence as of too uncertain a character to be relied on. The decree must be in favor of the libellants, with an order of reference to ascertain the amount of their damages.

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JUNE, 1866.

**GEORGE SHAW ET AL. v. THE STEAMBOAT  
BRIDGEPORT.**

**COLLISION AT A PIER IN A FOG.—INEVITABLE ACCIDENT.—STEAMERS  
REQUIRED TO NAVIGATE THE MIDDLE OF THE EAST RIVER.**

Where a steamboat was coming down the East River round Corlear's Hook, and a thick fog shut down upon her, and not being able to anchor, the bottom being bad, and the place dangerous by reason of the ferries, she slowed her speed to the lowest point, and proceeded, having two lookouts stationed forward, running by compass till opposite the Grand St. Ferry, whose lights they saw and whose bells they heard, and her master then commenced to turn her, taking a course which he thought would carry her pretty close to the piers below, but would clear them, and though at once stopping and backing when the lookout reported a vessel ahead, ran into the vessel which was lying alongside of a pier below the Hook.

*Held*, That this was not a case of inevitable accident.

That prudence, to say nothing of the State law, required the master to take such a course as would bring the steamboat into the middle of the river below the Hook, and the collision was occasioned by that error on his part.

The facts appear in the opinion of the Court.

For libellants, *D. D. Lord, Esq.*

For claimant, *E. H. Owen, Esq.*

**BENEDICT, J.** This action is brought by the owners of the ship *Margaret Evans*, to recover some fourteen thousand dollars, being the amount of damages sustained by that ship in a collision which occurred in this port on the 4th of September last.

There is little or no dispute as to the facts of the case, which are these. The *Margaret Evans* was lying alongside the pier at the foot of Corlears Street, and

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The Steamboat Bridgeport.

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wholly inside the line of the piers below the Hook. While so moored, and between three and four o'clock in the morning, she was run into by the Bridgeport while she was proceeding down the river to her pier at Peck Slip, in a thick fog. It appears that when the steamboat passed Blackwell's Island, the fog, which had come on during the night, lifted so that both shores could be seen; but when she arrived off Houston Street ferry, it suddenly shut down upon her so thick that it was impossible to see objects at any considerable distance. The speed of the steamboat was at once slowed down to the lowest point, and she proceeded on her voyage; the bottom there being unfit for anchorage and the place dangerous, by reason of the ferries.

As she proceeded she had one chief mate, in addition to a regular look-out, stationed forward, and her master was in the wheel-house with the wheelsman. Just after she passed Grand Street ferry the look-out saw and reported a vessel ahead, when the engine was instantly reversed; but before more than one and a half turns back could be made, she brought up square upon the star-board side of the vessel ahead, which proved to be the Margaret Evans, lying alongside of the pier as above described. The look-outs were competent persons, and saw the vessel at the earliest possible moment. The engine was in good order, and was reversed as soon as possible after the ship was reported. The speed was as low as she could run and have steerage way. The fog was very thick, but the Grand Street ferry light was seen by the mates of the steamer as she passed the ferry, and after that a light upon the New York shore. The Grand Street bells were also ringing.

These circumstances, the claimants insist, make out a case of inevitable accident. But to this view I cannot give my assent.

To make out a case of inevitable accident it must appear that the collision could not have been avoided by



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The Steamboat Bridgeport.

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the exercise of ordinary care, caution and maritime skill. Here it appears that the Grand Street lights and bells which were 260 feet only from the point of the Hook, and some 900 feet from the Margaret Evans, were seen and heard, and the position of his vessel was then known to the master, as he had seen, by compass from opposite Houston Street ferry, where he was in the middle of the river, and my opinion is that those lights and bells were sufficient to enable any master, by the exercise of ordinary maritime skill, to pass the Hook in safety and at the proper place.

Furthermore, the wheelmen say, that after they struck the fog they ran by compass till opposite the Grand Street ferry light, which they saw; that they commenced to turn, and took a course which they supposed would carry them pretty close to the piers below the Hook, but yet, as they believed, far enough out to clear vessels lying at them.

This was clearly negligence; for prudence, to say nothing of the State law, required them in such a fog to take a course which would bring them in the middle of the river below the Hook. To accomplish this it was necessary to run some lengths below the Grand street ferry before commencing to turn, as the master must have known, instead of which he hauled in when opposite the Grand Street ferry, and took a course which he knew was carrying him inside of the middle of the river, and close to the piers.

Had the effort been made to keep in the middle of the river, I doubt not but that it would have been successful, notwithstanding the density of the fog.

The decree must accordingly be for the libellants, with an order of reference to ascertain and report the amount of the damages resulting from the collision.

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The Steamship Merrimac.

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JULY, 1866.

**JOSEPH FORBES ET AL. v. THE STEAMSHIP  
MERRIMAC.**

**SALVAGE.—PRACTICE.—PLEADING.—SUIT PENDING IN ANOTHER DISTRICT NO BAR TO SUIT HERE FOR SEPARATE SALVAGE SERVICES.—LACHES.—STALENESS.—EXCESSIVE BAIL.**

Where a libel was filed by passengers on the Merrimac, to recover for alleged salvage services, while on a voyage from New Orleans, to which port the vessel returned; and the answer set up that a suit was commenced in New Orleans against the steamship in behalf of another steamer, which towed her up to the bar, to recover a salvage compensation for such services, and that the claimants had bonded the vessel in New Orleans, and the suit was still pending; and the answer claimed that the libellants should have joined in that suit, or filed their libel in New Orleans.

On exceptions by the libellants to this part of the answer,

*Held*, That the pendency of one action for salvage is no bar to another suit by other salvors, for other services during the same voyage.

That the suit in behalf of the Morgan is no bar to this suit by the passengers.

That the libellants cannot be held to have lost their claim by failing to file their libel in New Orleans, under the circumstances alleged in the answer.

The practice of bringing such suits even for different services, in different courts, is disapproved.

As to the hardship of compelling the claimants to bond here, after they have bonded her in New Orleans, their remedy is by motion. The Court will, on application, always reduce bail to such an amount as shall be reasonable security for the claim.

This case came before the Court upon exceptions to the tenth article of the answer.

The libel was for salvage, and it averred that in November, 1865, while the steamship Merrimac was on a voyage from New Orleans to this port, and when some two hundred miles out, she sprung a leak, and made water so fast as to extinguish her fires, and rendered it necessary to resort to bailing as the only means of saving the ship;

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The Steamship Merrimac.

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that accordingly, a colored regiment of United States soldiers, which was being transported in the steamer, having been divided into companies for the purpose, undertook to keep the ship free, and by constant bailing from the 11th until the 14th of November, enabled the vessel to return to a place of safety off the port of New Orleans. For this service the libellants, who are officers of the colored regiment, in behalf of themselves and all others interested, claim salvage. The answer, in the article objected to, set forth the following facts: That the steamship, after being brought to the place of anchorage, was towed up to the bar by the steamship Morgan, and was thereupon arrested by virtue of process issued out of the District Court of the United States for the Eastern District of Louisiana, upon a libel filed in that Court by Charles Morgan, in behalf of himself and all other persons interested in the steamship Morgan, to recover of the Merrimac salvage for services performed by the Morgan, in lying by her on the night of the 14th of November, and afterward towing her up to the bar; that in said action, the claimants appeared and bonded their vessel, and said action is now pending, undetermined, in the said District Court, of all which it is averred the libellants in this action had notice, being then present in New Orleans. These facts were pleaded in this article of the answer as a defence to the action, and it was claimed that the libellants were bound to have made themselves parties to the action brought in New Orleans, or to have filed their libel there, and that the pendency of that suit was a bar to their action commenced here after the release upon bail of the vessel in New Orleans.

For libellants, *Mr. Benedict, and Messrs. Emerson, Goodrich & Knowlton.*

For claimants, *Messrs. Spencer, Hoopes & Metcalf.*

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The Steamship 'Merrimac.'

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BENEDICT, J. The pendency of another action for salvage has never, to my knowledge, been held to bar a subsequent action by other salvors against the same vessel to recover salvage for other services performed during the same voyage; on the contrary, two, and sometimes more such actions have been maintained in the same Court, where the circumstances warranted it. Such was the case of the *Henry Ewbank*. (1 *Sum.* 400.) Such the late case of the *Philadelphia*. (1 *Browning & Lushington*, page 28.)

When there are several sets of salvors claiming to have performed separate and distinct services, and especially where the interests of the various salvors are somewhat antagonistic, as is often the case, it is not only proper but sometimes necessary that several libels be filed. In the present case, the libel filed by Charles Morgan was filed not for the benefit of all persons claiming to have been salvors of the *Merrimac*, but solely for the benefit of the owners and crew of the *Morgan*, and it set forth only the services performed by the *Morgan* after the termination of the principal labors by the libellants in this action. The pendency of such an action can be no ground for dismissing a second action in behalf of the passengers of the *Merrimac*, setting forth and claiming salvage for services performed in bailing the ship up to the time of her arrival at the bar. Neither can it be held upon the facts set forth in this article of the answer, that these libellants have lost their right of action, by failure to file their libel in New Orleans while the steamer was there. Cases undoubtedly arise where the omission to take proceedings to obtain an adjudication upon a claim for salvage at the time and place where other similar claims are being determined, would be held to amount to a waiver of the claim, and a subsequent libel would be dismissed upon the ground of staleness or laches. But the facts set out in the tenth article of the answer do not necessarily make this such a case. It cannot be

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The Steamship Merrimac.

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certain that the hearing will not disclose circumstances perfectly consistent with all the facts set forth in the article, which will excuse the delay in prosecuting this action. Nor does it appear from the facts set out in this answer, that it is necessary in order to accomplish substantial justice, that the two claims for salvage should be presented to and passed on, by one and the same court. The services performed by the Morgan was apparently distinct from the service claimed to have been performed by the libellants, and it does not necessarily follow from the facts disclosed in the answer that the award to the libellants, if any, would be affected by the award made to the owners and crew of the Morgan. It is not intended, however, to approve of the practice of bringing such actions in different courts; on the contrary, such course is disapproved, and nothing more is intended to be decided here than that the facts set out in the tenth article of this answer are not sufficient to require a dismissal of the libel. The effect of the omission to file in New Orleans upon the question of costs, or upon the question of the amount to be awarded to the libellants, if any be awarded, as well as the question of laches and staleness, are matters left to be disposed of upon the hearing, when all the facts of the case are before the Court. Upon the argument of the exceptions, the hardship of compelling the claimant to give bonds in \$100,000 here, after they had bonded their steamer in the action in New Orleans, was greatly insisted on. But the way of relief from this inconvenience is by motion. This Court will always promptly reduce the stipulation for value required in any case, to such sum as shall seem to be reasonable security for the claim as presented in the libel; and if excessive bail has been demanded in New Orleans, like relief can there be obtained. The decree must accordingly be that the exception to the tenth article of the answer be allowed without costs, and with leave to reform the answer in accordance with the views expressed in this opinion.

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300 Barrels of Alcohol

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JULY, 1866.

THE UNITED STATES *v.* 300 BARRELS OF  
ALCOHOL.MARSHAL'S COSTS.—KEEPER'S FEES.—PREMIUM OF INSURANCE.—CART-  
AGE AND STORAGE.

Where alcohol was seized in an unlocked shed by an internal revenue collector, and on a libel being filed, was seized by the marshal, and after a delay of many months was bonded by consent of all parties, the claimant consenting to pay the fees and expenses of the marshal, and the clerk taxed \$2.50 a day for keeper's fees from the date of the seizure, and an item for cartage and storage, and another for premiums of insurance paid by the marshal on a monthly policy which valued the alcohol at its market value, tax paid; and an appeal was taken from the clerk's taxation of these items—

*Held*, that the sum actually paid a keeper to watch property in custody, not exceeding \$2.50 a day, may be taxed upon satisfactory proof (1) that a prudent precaution in regard to all concerned in the property justified the marshal in placing a keeper over it, and (2) that the keeper actually continued in charge of it for the time specified, and that the sum charged has been actually paid by the marshal.

That on the facts the items for cartage and storage were justified by the situation of the property, and the marshal's responsibility for the property seized by him was not affected by the fact that a collector of another district claimed that the property had been in his possession under entry for deposit in a United States bonded warehouse.

That the objection to the item of insurance, because the policy was monthly instead of yearly, cannot prevail, the claimant being shown to have been informed of the form of the policy.

That the marshal would not have been justified in insuring this property as if it were in bond. He could only treat it as property belonging to the United States, and insure it at its full value.

That under the consent to pay the marshal's expenses, it could not be claimed that this part of his expenses should be stricken out as chargeable to the United States alone.

This case came up upon an appeal from the clerk's taxation of the marshal's fees. The information in the case was filed in October, 1865, and averred that the property proceeded against had been seized by Collector

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300 Barrels of Alcohol

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Wood, of the Second District, as forfeited to the United States for a violation of the Internal Revenue Act. Process was thereupon issued to the marshal, directing him to attach the property. Accordingly the marshal seized the same, and retained it in his custody under the process.

On the 14th of July, 1866, upon the written consent of the district attorney and the attorney for the claimants, an order was made for the appraisement of the property, and its delivery on bail upon payment of the fees and expenses of the marshal. Under this consent and order, the property was appraised, and the marshal's fees presented to the clerk, and by him taxed.

Among other items, the clerk allowed an item of two dollars and a half for each day after the seizure of the property, besides an item for the cartage and storage of the property, and an item for premiums paid for its insurance while in custody. It was to the clerk's allowance of these items that objection was taken.

BENEDICT, J. The objection to the item of \$2.50 per day for keeper's fees paid is rested upon the question of fact, whether there had been a daily watching of the property by the marshal or persons in his employ. Upon this issue the weight of evidence is clearly against the claimants. The affidavit of the keeper is positive, and the statement made by the proprietor of the warehouse does not amount to a contradiction of the keeper. The ground upon which the objection to this item rested fails to sustain it.

I notice, however, that an explicit statement that the amount charged for the keeper has been actually paid is wanting. The sum actually paid a keeper to watch property in custody, not exceeding \$2.50 a day, may be taxed by the clerk upon satisfactory proof that a prudent precaution in regard to all concerned in the property justified the marshal in placing a keeper over it; that

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300 Barrels of Alcohol.

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the keeper actually continued in charge of it for the time specified ; that the sum charged therefor is reasonable for the service, and has been actually paid by the marshal. (The Trial, *Blatch. & Howl. Rep.*, p. 104.) The proof in this case is not sufficiently full in all these particulars. Before the item can be allowed, there must be proof of the necessity of a keeper daily, and that he has been paid. This proof may be given before the clerk.

The objection to the charges for the expense incurred in the removal and storage of the property cannot prevail. It appears by the affidavits of the claimants, as well as by the information, that the property was first seized by Collector Wood, of the Second District, and that when found by the marshal, after the commencement of proceedings to enforce the forfeiture, as is stated by the deputy and not denied, it was in an unlocked shed or outhouse upon a wharf. No objection to the marshal's taking custody of the property was ever made by Collector Wood, and he must be deemed to have assented to it under the option given him by the act as it then stood. The responsibility of the marshal for the safe keeping of property coming into his possession under such circumstances is in no wise affected by the fact that at a period subsequent to its seizure by him, Collector Bowen, of the Third District, claimed that the property had been at all times in his possession under entry for deposit in a United States bonded warehouse. If constructively in his possession, it appears actually to have been seized by Collector Wood, and to have been found in an exposed position upon a wharf, and not in charge of any person who claimed to represent Collector Bowen, or claimed that it was in his custody under bond.

Considering the character of this property, and its position when so found, I am satisfied that removal to a proper storehouse after its seizure was a proper act on the part of the marshal, required of him in the line of his duty, and that the reasonable and necessary expense



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300 Barrels of Alcohol.

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of such removal and storage, actually paid by him, should be allowed. As no objection is here made to this item upon the ground that the amount is excessive, the clerk's allowance is confirmed.

To the item of premiums paid for insurance, the principal objection is that the insurance was effected by a monthly instead of a yearly policy, whereby the rate of insurance was greatly and unnecessarily increased. But I see nothing in the case tending to lead the marshal to believe that the property would remain in his custody for any considerable period of time, or to charge him with negligence or extravagance in taking out or continuing a monthly policy. It is nowhere made to appear that the marshal was ever requested to insure the property for any long period, or that objection was ever made to the form of the policy, although the attention of the claimants was frequently called to the fact that the insurance was expiring, and that delay was increasing the amount of the premiums. It seems to me too late now, after such acquiescence, and after the premiums have been actually paid by the marshal in good faith, and without suspicion of fraud or connivance, to raise the objection, and ask that the item be stricken out of his bill because a policy was not taken out for a year.

A further objection is raised to this item, that the property has been insured at its market value, as alcohol saleable in the market on the assumption that the tax on it has been paid, whereas, in fact, the tax on it has never been paid, but only secured by the bond of the owner taken by the collector, and that its value as alcohol in bond is much less than as free alcohol, and it should have been insured as such. I am unable to see the force of this objection. If bound to insure at all, the duty of the marshal was to insure the property at its value as it stood in his hands, and for the benefit of whom it might concern. It is not perceived that any difference exists between the condition of goods seized

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300 Barrels of Alcohol.

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for non-payment of tax and goods seized for non-payment of duties on imports, and in the numerous cases of the latter class which have arisen in this port, I have never known of its being claimed that the goods after seizure by the marshal should be treated as goods in bond. Furthermore, it is not made to appear that the marshal was, until a very late day, notified that the alcohol was ever in bond, and certainly he was not bound to assume it to be so. He could only treat it as property wholly belonging to the United States as forfeited for the violation of law, and insure it at its market value. Besides, in this case it appears that a written consent, signed by the attorney of the claimants, has been filed, in which it is stipulated that the marshal's fees and expenses are to be paid by the claimant before discharge of the property. Upon taxation of the marshal's fees and expenses in this cause, under that consent, I do not think that it can be fairly contended that part of his expenses should be stricken out as chargeable to the United States alone. The item of premiums of insurance must therefore be allowed.

In dismissing this case, I feel bound to express my surprise that this property has been allowed to remain in custody for so long a period of time. If any reason existed why the cause should not have been tried, as it might have been long ago, I conceive of no good reason why the property has not been sold or bonded. The same action now being taken by the claimant could, for aught that appears, have been taken immediately after the seizure of the property, in which case the items of expense now complained of would have been insignificant, and the hardship of the case avoided.

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The Anchors, Sails, &c., of the Brig D'Alberti.

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OCTOBER, 1866.

NATHANIEL DOMINY *et al.* v. THE ANCHORS,  
SAILS, &c., *saved from the Brig D'ALBERTI.*

## SALVAGE AGREEMENT.—TENDER.—WEIGHT OF EVIDENCE.—COSTS.

Where several wreckers were engaged by parties who had bought a wreck, to assist in saving the materials, and libelled the property saved to recover salvage compensation, the claimants insisting that the work was done under an agreement for a stipulated price, made with Dominy, one of the libellants, whose special authorization to make the agreement was disputed;

*Held*, That in a conflict of positive statements, the surrounding circumstances become of great importance, and that under the circumstances the agreement for a stipulated price must be held to have been made.

That even if there was no formal authorization of Dominy to make such an agreement for all the libellants, the evidence showed that he was the head and spokesman of the libellants, and they must have been cognizant that some agreement had been made by him, and must be deemed to have acquiesced in it.

No tender of the amount remaining due of the stipulated price, nor any payment into Court with a plea of tender having been made, the libellants are entitled to a decree for that amount with their costs.

The libellants in this case were wreckers near Sag Harbor. The brig D'Alberti, having been driven ashore, was bought as a wreck by the claimants in this case, and the libellants did work in saving the rigging and other material of the wreck. They thereupon filed this libel against the articles saved, claiming to recover salvage. The claimants, on the other hand, insisted that the work was to be done for \$75, under an agreement made by the libellants, through the libellant Dominy.

For libellants, *Mr. Gardiner* of Sag Harbor, and *Mr. Scudder*.

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The Anchors, Sails, &c., of the Brig D'Alberti.

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For claimants, *Mr. Gleason* of Sag Harbor, and *Mr. Benedict*.

BENEDICT, J. This action is brought by several wreckers to recover salvage compensation for services performed by them at Montauk, in stripping and landing from the brig D'Alberti, certain anchors, chains, spars, sails and rigging, of the value of some fourteen hundred dollars. Upon the hearing, it was conceded on both sides, that no question as to the saving of the anchors and chains arises in this cause, the libellants claiming them as owners by purchase, and that title being in process of adjudication before a court of this State.

The only question before me, then, is as to the compensation for labor performed in saving the residue of the property. For this labor the libellants claim to be paid as salvors acting without any agreement as to price, while the claimants insist that the price was fixed by agreement before the work was undertaken.

I have examined with care, the very contradictory evidence introduced by the respective parties, and while endeavoring to give due weight to the arguments advanced on the part of the libellants, am constrained to hold that the weight of the testimony is in favor of the claimants. In such a conflict of positive statements in regard to matters of fact where there should be no dispute, the surrounding circumstances become of great importance. The circumstances attending this transaction, about which there is little or no dispute, seem to me to go far to sustain the theory of the defence. It can hardly be deemed probable that the claimants, having just bought this wreck in the manner described in the testimony, for the sole purpose of realizing a profit from the sale of the articles which could be saved from it, would, at the same time, request or allow a company of wreckers to perform the labor without some agreement as to the expense. Such an agreement is testified to by several witnesses, who swear with great distinct-

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The Anchors, Sails, &c., of the Brig D'Alberty.

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ness to the details of the occurrence, and although positively denied by Dominy, must, upon the evidence, be held to have been made.

But it is insisted that if an agreement was made by Dominy, it cannot be binding upon the other libellants, in view of the positive evidence of Dominy and others of the libellants, that no authority to make such an agreement was ever conferred upon Dominy. Now, while it may well be that no formal or definite authorization of Dominy to make this contract in behalf of himself and his associates was ever given, still it is quite manifest that the actual relation of the libellants, as understood and acted on by them throughout the whole transaction, was that of a company of persons associated together for a common temporary purpose, with Dominy as their head and spokesman. Thus Dominy, acting for all, received money earned by the company in labor performed about the brig for the Insurance Company. He also received the money earned by the company in labor performed for Rockwell about the cargo. He not only received for all the money paid for labor performed by them on the brig, on the day of and before the sale to the claimants, but, acting for all, arranged to take the credit of these very claimants for it, and subsequently received it from them instead of from the master. When, during the performance of the work in question, money was needed to pay a man taken in to help them, Dominy was requested to apply, and did apply, to the claimants for \$20, and received it on account of the work. Moreover, the job was undertaken by the libellants without any communication between the claimants and any of them, except Dominy, either as to rate of wages, number of men, or extent of the labor to be required, while at the same time it is not pretended that it was to be performed at day's wages. These and other circumstances in the case have convinced me, that the members of the company must have

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Two Anchors and Chains.

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been cognizant of some agreement having been made by Dominy, which they are to be deemed to have acquiesced in, and under which they performed the services in question. Without, therefore, considering the evidence offered to show that \$75 would be full compensation for the labor performed, I must hold that the compensation was fixed at that sum by agreement.

It does not appear that all of this price has been paid; the evidence shows payments amounting to \$53.80, but fails to show more.

The libellants are therefore entitled to a decree for the balance, \$21.20, against the property, excluding the anchor, and as there was no legal tender or payment into Court with plea of tender, the libellants are entitled to their costs.

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OCTOBER, 1866.

JOHN LLEWELLYN *et al.* v. TWO ANCHORS AND CHAINS.

SALVAGE.—DERELICT.—THE WHOLE VALUE DECREED.

In a case of derelict property, of small value, notice of the proceedings having been brought home to the owners of it, who failed to appear in the suit and had expressly abandoned the property to the libellants, the Court awarded the whole balance (\$107) to the salvors after payment of costs.

BENEDICT, J. This is a case of salvage of two derelict anchors and chains of no great value. Although actual notice of the proceeding is brought home to the

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The Sloop Joseph C. Griggs and her Cargo.

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owners of the property, no appearance is entered for any claimant, and the proofs disclose that the owners in express terms abandoned the property to the libellants. In such a case the balance of the whole proceeds, after payment of the costs, may be awarded to the salvors, by whose exertions the property was saved. (The William Hamilton, 3 *Hagg.* 43.)

Let a decree be entered awarding to the libellants the whole proceeds in Court (\$107), after deducting the costs.

For libellants, *Mr. Goodrich.*

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NOVEMBER, 1866.

JOHN H. HOLMES *v.* THE SLOOP JOSEPH C.  
GRIGGS AND HER CARGO.

SALVAGE.—STEAMBOAT.—COSTS.—PRINCIPLES OF PUBLIC POLICY IN  
SALVAGE CASES.

A sloop laden with iron ore, went on a rock in Hell Gate, and was left by her master and crew. The sailors, however, watched her from the shore till she was carried off the rock and floated towards the Bread and Cheese, a dangerous reef, when they put out in their boat to board her. A passenger steamboat on her way to Harlem also saw her position and went to her, and took her in tow before she reached the Bread and Cheese, and before the crew reached her, and towed her to Harlem; and the master of the steamboat, while negotiations were pending to settle the claim for salvage, filed a libel to enforce the claim.

*Held,* That the facts make out a clear case of salvage.

That the opinion of the crew of the sloop that they should have been able to save her if the steamboat had not gone to her aid, although to be taken into account in fixing the compensation, as indicating the extent of the risk, does not take the case out of the rules applicable to cases of salvage.

That the Court, if it were not a case of salvage, might be inclined to withhold from the libellant his costs, because of his putting the claim in suit, while it was in a fair way to be settled; but that the same considerations of public

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The Sloop Joseph C. Griggs and her Cargo.

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policy which affect salvage awards are not overlooked in disposing of the question of costs.

On a valuation of \$1,500, the Court allowed \$300 and costs.

The facts in this case appear in the opinion of the Court. The value of the sloop and her cargo was about \$1,500.

For libellants, *Messrs. Benedict, Tracy and Benedict.*

For claimants, *W. J. Haskett, Esq.*

This was an action in behalf of the owners and crew of the steamboat *Sylvan Grove*, to recover salvage. The evidence showed that on the morning of the 15th of March, 1866, the sloop *Joseph C. Griggs*, laden to the extent of her capacity with iron ore on deck, in passing through Hell Gate, was driven upon Negro Head Rock. Her large anchor had been let go, in an effort to avoid the rock, but had failed to bring her to, and she grounded upon a falling tide.

Her master and crew, anticipating that the sloop might heel over as the tide fell, removed their clothes, provisions, bedding, &c., to the boat, and in it betook themselves to the shore, intending, however, to watch the vessel, and attempt to save her in case she should come off under the action of the strong ebb tide. While thus abandoned for the time, a strain came upon the chain of the large anchor, which tore up the windlass and freed the vessel from the anchor, and about the same time the current swept her off the rock. She began at once to drift down the stream in the eddies which make rapidly from Negro Head Rock to the Bread and Cheese, a dangerous reef at the upper point of Blackwell's Island.

While the sloop was on the rock her position had been observed by the persons on board the *Sylvan Grove*, a fast passenger steamboat engaged in making hourly trips between Peck Slip and Harlem, and her movement



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The Sloop Joseph C. Griggs and her Cargo.

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being seen while the steamboat was landing at Astoria, the landing was hastened and an extra man taken on board, and the steamboat started to rescue her. She was reached before she struck the "Bread and Cheese," was at once boarded by some of the hands of the steamboat, and, lines being got out, was towed out of danger and taken to Harlem Flats. The movement of the sloop from the rock had also been noticed by her crew, who, with the exception of her master—then absent in search of his owner—at once started out in their boat, but failed to reach the sloop until just as she began to move in tow of the steamboat. They then boarded her, and with her were taken to Harlem.

The sloop sustained little or no injury while on the rock, and on being released from custody in this action, proceeded on her voyage without repairs.

These facts, which are not seriously questioned, present a clear case of salvage. The sloop, when taken hold of by the steamboat, had no one on board, and was drifting towards a dangerous shoal, where, if she had struck, the total loss of her cargo would have been almost certain, and the vessel herself seriously injured, if not destroyed. The testimony of the crew and others, greatly relied on by the claimant, to the effect that, in their opinion, the vessel would have been saved by her crew if the steamboat had not gone to her aid, although to be taken into account in fixing the amount of compensation as indicating the extent of the risk, does not take the case out of the rules applicable to cases of salvage.

"A situation of actual apprehension, though not of actual danger, makes a case for salvage compensation." (The *Raikes*, 1 *Hagg.* 247; The *New Holland*, *Vice Ad.* at Gibraltar.) "Salvoes," says Judge Story, "are not to be driven out of Court upon the suggestion that, if they had not touched a derelict ship, the latter might in some possible way have been saved from all calamity, and

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therefore the salvors have little or no merit." (The Henry Ewbank, 1 *Sum.* 414.)

The case being then, in my opinion, one for a salvage award, it remains to fix the amount. In determining this, I bear in mind that the whole doctrine of salvage rests upon considerations of public policy. I also take into consideration, on the one side, that the service in question was rendered promptly ; that it was performed by a steam vessel ; that the steam vessel was a passenger boat, at the time engaged in making a regular trip ; that the place was one beset with dangers for sailing vessels, where steamboats of this class can often render powerful and much needed aid. On the other side, I notice that the steamboat was not detained so as to interfere with her next trip ; that the service involved little labor or skill and no risk ; that the crew of the sloop was near at hand, with a chance of being able, without assistance, to get their vessel into the true tide, and so to tow her by their boat to the adjacent shore.

How considerations like these have affected the determinations of Courts of Admiralty in awarding salvage, the cases, unnecessary to be cited here, will show. As somewhat analogous to the present case, I may, however, refer to the case of the Margaret, (Shipping Gazette, 1857,) where a brig had touched on the spit of the Dutchman's Bank, but shortly afterward came off with loss of anchor, and then let go another and hoisted a signal, and where the Court in awarding £250 to a tug which went to her aid, held that "not only the present, but the prospective state of danger of the vessel rescued was to be considered." I also refer to the case of the Ocean Witch, a schooner of 136 tons, which was towed off the sands in the Thames, where the Court awarded £100, "in order to encourage steamers to assist vessels when ashore in the Thames." (Shipping Gazette, February, 1853.) After duly weighing the considerations which the present case seems to present, my conclusion is that

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\$300 is the proper sum to be awarded to these salvors, and I shall also give them their costs, although in view of the evidence tending to show that either undue haste or a misapprehension on the part of the master of the steamboat caused the claim to be put in suit while it was in a fair way to be settled without expense, I might, were it not a case of salvage, be inclined to withhold them. But I find, on looking into the cases, that the considerations of public policy which so largely affect every award of salvage are not overlooked in disposing of the question of costs, and that I should be departing from the rules usually applied in these cases by withholding costs. Thus, Dr. Lushington, in the case of the *Rosalind*, (Mar. Law Cases, vol. 2, p. 220,) when he dismissed the libel on the ground that no salvage service had been performed, gave the libellants their costs, "in order to recognize the meritoriousness of their intentions;" and in the case of the *Countess of Levin Melville*, (1 Mar. L. C., p. 154,) the same learned Judge, when pronouncing in favor of a tender made without costs, declared the salvors to be entitled to full costs. So, too, in the case of the *Innocenza*, when a libel for salvage was dismissed without costs against the salvors, he cites, with approval, the words of Lord Stowell, that, "if, as a general rule, he accompanied a decree (adverse to salvors) with costs, it would discourage other salvors, a class of people not very able to comprehend these matters, and therefore would be likely to injure public interests." See, also, Coote's Pr., page 63. A decree must accordingly be entered in favor of the salvors for the sum of \$300 and their costs to be taxed.

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NOVEMBER, 1866.

**PATRICK QUINN v. *The Steamboat* TRANSPORT,  
and *The Propeller* W. E. CHENEY.**

**EXCEPTIONS TO LIBEL.—PLEADING IN BEHALF OF VESSELS INJURED  
BY COLLISION WHILE IN TOW.—FULL STATEMENT OF FACTS  
MUST BE GIVEN IF POSSIBLE.**

A canal-boat in tow of a steamboat was injured in a collision with another steamboat. The owner of her filed a libel against both vessels, in which he did not set out the facts of the collision, though the movements of the vessels were seen by a person on board the canal-boat. The claimants excepted to the libel.

*Held*, That exceptions to a pleading in Admiralty have the effect of a demurrer, and also that of a motion to make the pleading more definite and certain.

That to make cases of collisions like this exceptions to the general rule, which requires a full statement of the facts of the collision, would be to permit the parties to come to trial without any preliminary statement from either party, which would be of any assistance to the Court, or would apprise the parties most in interest, of the facts which they are called on to meet.

Whether such exceptional pleading might be allowed where the libellant was unable to give any statement of the facts of the collision—*quere*.

That the present is not such a case, and the libel must be reformed by setting forth as far as practicable, the material circumstances attending the collision in question.

This case came up on exceptions to the libel as being defective in not setting out the facts of the collision which occasioned the damage, to recover which the suit was brought.

For libellants, *Messrs. Emerson, Goodrich & Knowlton*.

For claimants, *C. F. Sanford, Esq.*

**BENEDICT, J.** Exceptions to a pleading in Admiralty have the effect of a demurrer, and also that of a motion to make more definite and certain, and are properly re-

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sorted to in a case like the present, where the libellant in a collision case has contented himself with simply stating a bare cause of action, and has omitted the full and frank narrative of the material circumstances attending the accident, which the general practice of the Admiralty requires in cases of this description.

The manner of pleading adopted by this libellant is sought to be defended upon the ground that the action is one brought against two steamboats for injuries sustained by a canal-boat while in tow alongside of one of them, she being thus a mere passive object, not able to take any measures of her own to avoid the collision, and not responsible for the movements of either of the others ; and it is contended that in such case the libellant is not called on to set forth anything more than the fact that his vessel was in tow of one of the steamboats, and was injured in a collision occurring between her and the other steamboat.

I cannot give my assent to this doctrine, to the extent claimed here. In this case the averments of the libel indicate that the collision and the antecedent movements of the steamboats were seen by a person or persons on board and in charge of the canal-boat ; and I am unable to see why the circumstances as thus seen should not be set forth for the information of the Court, and to save labor in proving facts about which there may be no dispute, as well in this as in any case. The reason of the rule, which is applied in all ordinary cases of collision, would seem to exist in full force in these triangular cases, in which, above all others, the need of a full statement of the facts is felt. To make these cases exceptions to the general rule, as claimed, would be to permit the parties to come to trial without any preliminary statement from either party, which would be of any assistance to the Court, or would apprise the parties most in interest of the facts which they are called on to meet. I cannot believe that such a practice should be sanctioned.

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Furthermore, the twenty-third rule of the Supreme Court, which is held to provide for the full statement which is required in ordinary cases, makes no exception of cases like this ; and the rules of the English Admiralty, which are more precise in their requirements than the twenty-third rule, also seem applicable to such cases in the English practice.

My conclusion, therefore, is that the libellant must reform his libel by setting forth, as far as practicable, the material circumstances attending the collision in question.

This conclusion I do not understand to be adverse to the opinion of Judge Betts, in the case of the *Mary Jane Vaughan*, cited by the libellant. The reported opinion in that case does not show what were the averments of the libel there, but according to my recollection of the case as it came before me on a hearing on the merits, that was a case of collision in the night when there was no one on board the boat in tow, and when the libellant might, perhaps, be presumed to be unable to give any distinct account of the accident. The present is not such a case, and would not fall within the scope of that decision.

Exceptions allowed with liberty to amend within ten days. Costs of this hearing to abide the event.

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DECEMBER, 1866.

GEORGE PLACE ET AL. *v.* THE STEAMBOAT CITY OF NORWICH.

PRACTICE.—COLLISION.—BONDING VESSEL WHERE THE DAMAGES EXCEED HER VALUE.—OWNER'S LIABILITY UNDER ACT OF 1851.

A steamer bound from New London to New York, met with a collision, from the effects of which she sunk. She was afterward raised and repaired, and was then libelled by a freighter, to recover \$8,000 damages for loss of his goods on board. The vessel being in custody in the action, the claimants filed a petition, claiming that the liability of the owners was limited to the value of the vessel and her freight, according to the Act of Congress of March 3, 1851, entitled "An Act to limit the liability of ship owners." They alleged that the amount of losses exceeded the value of the vessel and freight, and that there was reason to anticipate actions against her to recover amounts exceeding her value, and prayed the Court for leave to file a stipulation in the appraised value of the vessel and freight, for the benefit of all persons entitled to liens upon her for losses occasioned by the collision; and that on the filing of that stipulation, the vessel and also her owners might be declared to be discharged from all liability for losses arising out of the collision.

The Court directed notice to be published for fourteen days, of the time and place of making the application for the order on the petition. Other libellants, having claims in all to the amount of \$30,000, appeared, and opposed the application.

*Held by the Court,* That the Act of 1851 does not authorize the discharging the vessel from the liens created by law, on giving the stipulation tendered; although it declares a limitation of the liability of the owners of ships, it nowhere undertakes to modify the law which creates a lien upon the ship for cargo lost, or undertakes to regulate or limit the liability of the vessel for such losses, or in any way provides for the enforcement or discharge of that liability, or for the taking of any sort of bond or stipulation for any purpose.

That the provision in the fourth section of that Act, authorizing the owners to take "appropriate proceedings" for the purpose of apportioning the sum for which the ship owners may be liable among the parties entitled thereto, does not warrant this application.

That the discharge of the vessel from the liens created by law, as asked for in the petition, could not be obtained by virtue of the Act of 1851.

That a Court of Admiralty cannot under that Act, in an action *in rem* against the vessel alone by a single freighter, make upon a petition a summary order declaring the owners of the vessel free from personal liability to any freighter on

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filing a stipulation as proposed. Such an order would be neither an assignment of the vessel to a trustee for the benefit of the persons having claims for losses, nor "appropriate proceedings in any Court to apportion the sum for which the owners may be liable, among the parties entitled thereto," which are the only forms of proceeding authorized by the Act.

That such "appropriate proceeding" must be a proceeding *in personam*, where the parties to be affected are duly brought before the Court, and in which a trial can be had on issues properly framed.

That such a proceeding would not be within the jurisdiction of an Admiralty Court. (*Cootes' Pr.*, p. 9; *The Saracen*, 6 *Moore*, p. 74.)

That the English authorities cited, have reference to the English Act, which expressly gives to the Admiralty Court, in such cases, the jurisdiction exercised by the Court of Chancery.

That the relief sought for the vessel and her owners, could not therefore be afforded under any of the provisions of the Act of 1851.

But that the application might be treated as one for a release of the vessel on bail, addressed to the ordinary discretion of the Court.

That the power to release property from arrest on bail, does not depend on any statute, but is one of the inherent powers of the Court. (*The Alligator*, 1 *Gall.*, 147.)

That under the circumstances of the present case, a stipulation in the form tendered, would protect all the rights of the lien creditors, and as effectually release the vessel from all the liens provided for in it, as the ordinary stipulation does from the claims made in the particular libel, which that stipulation is intended to secure.

That therefore the application to bond the vessel in this way might be granted.

The steamboat "City of Norwich," while on a voyage from New London to New York, on the 18th day of April, 1866, collided with the schooner "Gen. Van Vliet"—was seriously injured and set on fire thereby, and finally sank. She was afterwards raised and repaired, and was then seized in this action, which was brought by a freighter to recover of the vessel the sum of \$8,000 as damages, occasioned by loss of cargo in the collision and fire above mentioned.

The steamboat being in the custody of the Court in this action, the claimants filed a petition showing the liabilities of the owners to be limited to the value of the vessel and her freight, according to the Act of March 3d, 1851, entitled "An Act to limit the liability of ship owners," (9 *Stat. at Large*, p. 635,) and averring that the amount of



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losses by this collision and fire, exceeded the value of the vessel and the freight then pending, and that there was reason to anticipate actions against her to recover amounts exceeding her value ; whereupon they prayed the Court for leave to file a stipulation in the appraised value of the vessel and her freight, such stipulation to be taken for the benefit of all persons who should show themselves entitled to liens upon the vessel for losses occasioned by the collision and fire aforesaid, and that upon the filing of such stipulation the vessel be declared discharged of such liens. And they further prayed, that the owners of said vessel might be declared to be entitled to the benefit of the Act of 1851, and be also declared, upon the filing of the stipulation aforesaid, to be discharged from all liability for any losses arising out of the accident in question.

Upon the presentation of the petition, notice was directed to be published for fourteen days of the time and place of making the application, at which time several libellants, having filed libels to recover of the vessel some \$30,000, appeared and opposed.

*Mr. Leveridge and Mr. Owen* for the claimants, in support of the application, made the following points :

1. The facts make out a case which entitles the owners of the steamer to the benefit of the Act, limiting their liability to the value of the boat and her freight pending (9 *Stat. at Large*, p. 635). The language of the third section is broad enough to include not only their liability to the owners of the cargo on board the boat, but also their liability to the owners of the schooner and her cargo ; and so it has been decided (*Moore v. The Am. Transp. Co.*, 24 *How.*, 39 ; *Walker v. The Transp. Co.*, 3 *Wall.*, 150 ; *The Ann Caroline*, decided by Judge Nelson in the U. S. Circuit Court ; *The Ariadne*, decided by Judge Betts in the U. S. District Court). The excep-

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tion at the close of the Act does not apply to this case. The navigation of Long Island Sound is not "inland navigation." (24 *How.*, 1; 3 *Wall.*, 150.) Nor is the river Thames or the East River a "river" within that exception. And even if the collision and fire were occasioned by the carelessness of the master and crew of the boat, still it occurred without the knowledge or privity of the owners, and therefore does not affect their rights under the Act. The Act does not extend to the officers and crew as *representing* the owners. (3 *Wall.*, 153.)

2. As the owners are entitled to the benefit of the Act, the question is as to their remedy against those who claim to enforce against them a greater liability.

(a.) If there was but one libellant, the owners would easily avail themselves of the benefit of the Act.

(b.) In cases where there are several libellants, the fourth section provides that if the vessel and freight is not worth enough to pay all, they shall recover "in proportion to their respective losses."

(c.) Each libellant, therefore, in such case, has an interest in the *res*, which he cannot be deprived of by another's recovering a judgment or filing a libel first. The owners are not therefore liable to any one party for more than his proportionate share in the *res* or its proceeds. (*Pars. Mar. Law*, Vol. 1, p. 398.)

(d.) Even if the question of the limit of the liability could be raised in each action, it would lead to troublesome litigation, and would be unsatisfactory to all. It is for the interest of all that the amount of the fund out of which they are to be paid should be ascertained.

(e.) There is no difficulty arising from a want of proper parties, or of jurisdiction. All persons having claims against the boat and her owners might have been made parties as having an interest in her, or the action might be for the benefit of the libellants and all others interested. (The Commander in Chief, 1 *Wall.*, 43, 51, 52.) The libel

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being *in rem*, all persons interested, and all the world are parties to the suit, and bound by the decree made in it. (The *Mary*, 9 *Cranch R.*, 144; *Benedict's Adm.*, p. 203; 2 *Brown's Civ. and Adm. Law*, 112.) Moreover, in this case, all parties having claims have been called in by the notice published, and might intervene in this suit (*Bett's Adm. Pr.*, 203), or if they instituted separate suits, such suits would be consolidated with this. (The *William Hall*, 1 *Lush. R.*, 25.)

3. As the Court has jurisdiction of the suit and possession of the boat, it has power to order her to be delivered to her owners on their giving a stipulation to her full value. It could order her sold, and the purchaser would take her free from all liens. It may retain possession of her till final decree and sale, or may surrender her upon a bond for her value. (The *Phebe*, *Ware R.*, 362; The *Amalia*, 32 *Law Jour., N. S.*, 191.) No injustice would be wrought to the libellants by so doing, and all other parties would have a valid bond to the full amount of the owner's liability.

4. The Court may also order the freight money to be brought in, and thus become possessed of the entire fund. The Court administers justice on principles of equity, and therefore having jurisdiction of the cause, and possession of the *res*, it will retain it so as to do justice to all parties. Moreover, the Act itself (§ 4) gives this Court all the power needful to effect its purposes. This motion contemplates the end proposed by this section. Giving such a bond may be regarded as equivalent to acting under the provision authorizing the owners to assign the boat for the benefit of all parties. That proceeding is merely cumulative. The act does not require it to be done. The language is permissive. It does not require the owners to confess the wrong; that may be litigated.

5. Having such jurisdiction, the Court may also by order declare that the vessel and her owners, after filing such stipulation, shall be exempt from all liability for

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the collision, except under the stipulation. This was so decided by Judge Betts in the case of the *Ariadne*. It has been so decided also in England under their statute. (*The Amalia*, 32 *Law Jour. N. S. Adm.*, 191; 1 *Moore's Pr. Council Cases*, N. S. 471.

*Messrs. Huntley and Place, R. W. Townsend, Martin & Smith, A. McCue, P. S. Crooke, and Dimmick & Perry,* for the various libellants, opposed.

BENEDICT, J. The application now made to this Court upon this petition is supposed to be authorized by the provisions of the Act of 1851. It is novel in the relief sought, and raises questions hitherto but rarely discussed in the Courts of this country.

The first question raised is whether the Act of 1851 authorizes the relief prayed for, so far as such relief affects the vessel herself, by discharging her from the liens created by law, upon the filing of the stipulation which is here tendered. The answer to this question seems to be obvious when the provisions of the Act of 1851 are carefully considered, for it will be seen that that Act, although it declares a limitation of the liability of the *owners* of a ship, nowhere undertakes to modify or declare the law which creates a lien upon the ship for cargo lost or damaged, nor does it undertake to regulate or limit the liability of the vessel for such losses, or in any way provide for the enforcement or discharge of that liability, neither does it anywhere provide for the taking of any sort of bond, or stipulation for any purpose. Still the claimants insist that the provision in the fourth section which authorizes the owner to take "the appropriate proceedings in any Court for the purpose of apportioning the sum for which the owners of the ship may be liable, among the parties 'entitled thereto'" should be held to warrant the discharge sought by this proceeding.

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But taking a stipulation, and discharging a vessel from the liens on her, is a very different proceeding from a proceeding to apportion among various creditors the sum for which the owners of a vessel may be liable under the Act. Releasing a vessel on bail is simply substituting a stipulation in place of the vessel, to save expense, risk and loss. Neither the taking of the stipulation nor the order to discharge, involves the consideration of any question of apportionment of any sum, and it is difficult to suppose that the language of the fourth section was intended to include the well known proceeding of discharging a vessel on bail. It seems therefore quite clear that if this portion of the relief asked for in this petition can be obtained at all, it must be by virtue of other powers than those conferred by the Act of 1851.

The next question raised by this petition is, whether a Court of Admiralty, in an action like the present, *in rem* against the vessel alone, by a single freighter, can upon a petition make a summary order or decree, declaring the owners of the vessel free from personal liability to any freighter, upon filing a stipulation for the amount of their liability, as limited by the Act of 1851.

Now the Act authorizes but two forms of proceeding, one an assignment of the vessel to a trustee for the benefit of the persons having claims for losses, the other, "Appropriate proceedings in any Court to apportion the sum for which the owners may be liable among the parties entitled thereto."

If these claimants proposed to assign this vessel, now in custody of the marshal, to an officer of the Court, for the benefit of the parties entitled to make claim for losses, an order effecting their discharge from further liability could doubtless be made. But they do not propose to assign the vessel or their interest therein. What they do propose is to take the vessel upon giving a stipu-

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lation, which is not equivalent to delivering her up to an assignee as provided in this Act ; and as before remarked in regard to a discharge of the vessel herself, so in regard to a discharge of the owner it must be said that discharging the owners upon a stipulation is not "apportioning the sum for which they may be liable among the parties entitled thereto." But if taking a stipulation, and thereupon granting a discharge of the owners, could be considered one step towards apportioning the sum among the creditors, and so the proceeding, or part of the proceeding authorized by the fourth section of the Act, still the mode of procedure here adopted cannot be sustained, for it is not an appropriate proceeding to accomplish the end contemplated by the statute.

This is a petition filed in an action *in rem*, and seeking a summary order as part of the proceedings in the action ; but a proceeding to be an appropriate proceeding for the purpose intended by the Act, must in my opinion be a proceeding *in personam*, where the parties to be affected are duly brought before the Court, and in which a trial can be had on issues properly framed. Here the parties before the Court, and whom it is sought to bind by the order prayed for, are only before the Court so far as regards their right, title and interest in the vessel as lien creditors.

Their liens can undoubtedly be cut off by the sale of the vessel, and the affectation of the vessel in their favor may be intentionally waived or abandoned by them, but I am unable to see how the Court in this cause can declare their right of action *in personam* against the owners to be cut off. If the giving of such a stipulation as is here proposed would be a good defence in any future action, brought by freighters against the owners, it will hardly do upon the petition of these owners to treat this action against the vessel as such an action, and now give judgment for the defendants accordingly.

Nor would the case be improved if all the parties to

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be affected were brought before the court and issue duly joined by them ; for such a proceeding would be no part of an admiralty cause, and not within the jurisdiction of the admiralty. The general words, "any court," in the fourth section of the act, may give the District Court jurisdiction of such an equitable proceeding, but it by no means follows that it can be taken upon the instance side of the court. The jurisdiction of the admiralty, as exercised in every case, is indeed legal and equitable, but it does not follow that every proceeding which a court of equity may entertain, can be taken in a court of admiralty, and I know of no authority for holding that the court of admiralty can entertain a proceeding commenced for the purpose of apportioning among various creditors a common fund. Such a jurisdiction has been expressly denied in the case of the *Saracen*. (6 *Moore*, p. 74 ; *Coots Pr.* p. 9.)

But, further, if this proceeding could be entertained as a proceeding within the admiralty jurisdiction of the court, I see no necessity for making it a part of this suit. The condition of an action *in rem*, compelled to bear within it, through the stages of this and of the appellate courts, an equity suit, in which the original libellants, with various others, would be defendants, and the claimants the plaintiffs, would be so anomalous, and tend so greatly to deprive the suit *in rem* of that simplicity and dispatch which properly characterize it, that I should hesitate long before giving my sanction to the practice.

My conclusion therefore is, that the relief here sought for this vessel and her owners, cannot be afforded under any of the provisions of the Act of 1851. Nor is this conclusion in conflict with the English authorities cited by the claimants. Those decisions were made under the British Act, which differs from the American Act in material respects. Thus, after declaring the limitation of the owner's liability, the British Act provides as follows

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(§ 514): "In cases where any liability has been \* \* \* incurred by any owner in respect of \* \* \* damages to ships, boats, or goods; and several claims are made or apprehended in respect of such liability, \* \* \* it shall be lawful in England for the High Court in Chancery \* \* \* *to entertain proceedings at the suit of any owner, for the purpose of determining the amount of such liability subject as aforesaid, and for the distribution of such amount ratably among the several claimants*, with power for any such court to stop all actions and suits pending in any other court in relation to the same subject matter. And any proceeding entertained by such court may be conducted in such manner, and subject to such regulations, as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the court thinks just." These provisions it will be seen, confer more extended powers than are contained in the American Act, and they are exercised by the English Admiralty only by virtue of the Admiralty Court Act of 1861, (24 Vict. c. 10, § 13,) which declares, that "when any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty *the said court shall have the same powers as are conferred upon the High Court of Chancery by the ninth part of the Merchants' Shipping Act of 1854.*"

It is by virtue of these two statutes that Dr. Lushington has entertained petitions for relief similar to the one now presented, and those cases, if examined, show that such petitions are not received by the English Court of Admiralty as part of the proceedings *in rem*, but form independent actions with demurrers and answers. (The Wild Ranger, 1 Mar. Law Cases, p. 206.) They go up to the Privy Council independent of any action *in rem*. (The Amelia, 1 M. L. C. p. 362.) They are described in



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the reports as *suits* brought by *plaintiffs* against *defendants*. (The Wild Ranger, 1 *M. L. C.* p. 275.) The English cases seem therefore rather to sustain than overthrow the view which I have thus far taken of the present application.

This view derives support from the final determination of the Supreme Court in the case of the Ann Caroline, (2 *Wallace*, 538,) where "the whole matter of damages being open to revision," (p. 546,) and the point being expressly taken that the Act of 1851 did not apply in an action *in rem* to limit the recovery to the value of the claimant's vessel and freight, the court held that in an action *in rem* against a vessel for a collision, although it appeared that the amount of the personal liability of the owners under the Act of 1851 was less than the value of the libellant's vessel, the true measure of damages in that action was the value of the libellant's vessel, and that the decree must be for that sum if a stipulation for value to that amount had been given.

The views here expressed make it unnecessary to consider the point raised in opposition to this petition, and decided in 14 *Gray*, that none of the provisions of the fourth section of the Act of 1851 are applicable to cases when the losses have arisen out of a collision.

Thus far I have treated the application before me as a proceeding taken under the Act of 1851, but it may without injustice to any one be treated as an application for a release on bail, addressed to the ordinary discretionary powers of the court, and the more important portion of the relief sought may be thus obtained. So considered, the motion differs from the ordinary motion for leave to bond only in this, that the claimants, instead of a stipulation which shall be available to the libellant alone, tender a stipulation in the full value of the vessel and her freight, which shall be available for all the libellants who have filed, or may hereafter file, libels in this

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court, to recover damages caused by this collision and fire, and instead of a discharge which shall release the vessel from the claim of the libellants alone, they seek a discharge which shall release the vessel from all the claims secured by such stipulation.

Now the power to discharge from arrest property seized in a court of admiralty, does not depend upon the provisions of any special statute, but is one of the inherent powers of the court conferred upon it with its other general powers. (The Alligator, 1 *Gall.* 147.) From "motives of public convenience," the claimant is allowed to substitute an equivalent security in place of the *res*. (*Coote Pr.* p. 5.)

This power is daily exercised in actions *in rem*, because "a ship is made to plow the sea, and not to rot by the wharf,"—because serious damage to her owners is caused by her detention without benefit, and expenses are thereby increased,—all which may be obviated without injury to the rights of creditors by a delivery on bail. (*Benedict's Ad.* p. 246.) These considerations which lead to the ordinary discharge on bail, seem to me to press with their full force in favor of the discharge here sought. This vessel is detained from regular trips by the process against her. Her value, together with the amount of her freight, is insufficient to pay the amount of claims likely to be brought against her. A discharge on bail in each case would involve her owners in liability exceeding her value. (The Ann Caroline, 2 *Wallace*, 550.) It is manifest, therefore, that no prudent owner will give stipulations in the ordinary form for each claim. The consequence is, that unless a stipulation in the form tendered can be taken, the vessel must remain in custody until the termination of perhaps a long controversy, to the detriment of every interest concerned.

Some form of stipulation seems to be demanded by

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The Steamboat City of Norwich.

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the circumstances of the case, and I see no reason why the one proposed will not protect all the rights of the lien creditors, and as effectually release the vessel from all the liens provided for in it, as does the ordinary stipulation from the claim or claims made in the particular libel which such stipulation is intended to secure, which libel often includes several distinct parties, such as owners of a vessel and of the cargo, several seamen of one crew, different sets of salvors, and the like. A somewhat analogous effect is produced by the ordinary stipulation when taken in good faith without fraud or mistake, for a less sum than the whole lien intended to be secured by it. The English bond for latent demands is also analogous.

While, then, the stipulation proposed will secure the end which is required by "public convenience," and always sought by a court of admiralty, the taking of it, and the consequent release of the vessel, will improve rather than impair the position of the lien creditors. For the vessel is now under proceedings *in rem*, which must, sooner or later, terminate in a sale under a decree, or a sale as perishable. That sale will cut off all their liens and transfer them to the proceeds in court, reduced as those proceeds will be by the expense of custody and the rapid deterioration of a ship while lying idle. Instead of that fund as their sole resort, if the vessel be discharged on the stipulations tendered, the creditors will have a stipulation as available as the vessel now is, and for its value, with the addition of the amount of the freight. Proper precaution being exercised in the examination of the sureties, and in ascertaining the value of the vessel, which the court will by its order always secure—represented as all creditors will in effect be upon the justification of the sureties and the appraisal of the vessel by the other libellants before the court,—as public a notice of the proposed discharge

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having been given as is required to be given of a condemnation and sale—it cannot be said that the position of any lien creditor will be impaired by the release of the vessel in the manner proposed.

Nor is it seen that any inconvenience will arise, if the practice here indicated should be adopted; but, the contrary. One effect would be to bring before one court all demands claimed to be liens arising out of the same occurrence, a result certainly desirable if not made necessary by the opinion expressed by the Supreme Court in the case of the Commander-in-chief. (1 *Wallace*, p. 43.) Another effect, and one often beneficial to the owners of ships, would be to afford a method by which a ship can be promptly relieved from liens arising out of a collision. In the absence of any such method, every vessel having been in collision must remain subject to all liens thereby created, until the demands shall have been prosecuted or become stale; and these liens are uncertain in amount and often unknown. They therefore interfere with a sale of the vessel, and form one of the disabilities affecting this class of property which such a discharge on bail will remove, and in a much cheaper and more effective manner than the formality of a collusive sale under decree, to which ship owners have sometimes been driven in the absence of any other method of relief.

In addition to the facts above stated, it also appears in this case that the owners of this vessel are willing to furnish stipulators of unquestioned ability, while they are themselves a corporation with a place of business in this port and abundantly able to respond to any decree that may be rendered. The voyage in question was between New London and this port, where the persons having claims upon the vessel may be supposed to be, or to be represented. Public notice of the intention to apply for the release of the vessel in this manner has moreover been given by special advertisement. There

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is, therefore, little danger of surprise, certainly none of detriment, to the lien creditors not actually before the court, if this relief be granted.

A single question remains to be determined, that is, as to the time when the value of the vessel is to be taken for the purpose of fixing the amount of the stipulation. Were the vessel of the value now that she was immediately prior to the accident, that value would be taken, but it is suggested by the papers before me that she has been altered, and her value increased since that time by the act of her owners, and it may be that her value has changed by reason of a change of the market, and therefore under the views which I have above expressed, a question arises whether the lien creditors are not entitled to have the benefit of any increase of her value. (See *The Alien*, 1 *W. Rob.* 119; *Coote Pr.* 4.) This question can be more safely disposed of upon the settlement of the order, when the facts attending the repairing of the vessel may be shown. It is accordingly reserved until that time.\*

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\* This question of value was not made the subject of dispute, but agreed upon between the parties. The stipulation which was given under the above decision was as follows: It set forth the filing of the libel by Place, and the arrest of the vessel under the process; the subsequent filing of other libels; the valuation of the vessel at \$70,000; the filing of a claim by the owners in each of the suits, and their application to have the vessel discharged on giving this stipulation. It then proceeded in the following words: The parties hereto agreeing, that the said claimants and owners, The Norwich and New London Transportation Company, parties hereto, in all cases in which libels may hereafter be filed in this court against the said steamboat to enforce liens or claims upon or against the said steamboat by reason of said collision and fire, upon notice to them or their proctor, to be given by publication or otherwise, as the court may direct, will, within the time limited by the court, enter an appearance without service of process, which is hereby waived, and that in default of such appearance such proceedings may be had and such decree made in such causes respectively, as to the court may seem proper, and with like effect as if said owners and claimants, and their sureties, the parties hereto, had appeared and consented thereto.

And the parties hereto further consenting and agreeing, that they will, to the extent of the amount of this stipulation, abide by and perform all orders and de-

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I have been thus particular in considering this application, on account of its importance, and also because it was claimed on the hearing that an order made by the judge of the Southern District as late as February, 1866, in the case of the *Ariadne*, indicates an opinion on his part that the Act of 1851 confers upon the District Court in Admiralty, the power to grant all the relief here prayed for. No opinion was delivered by that learned judge in the case referred to, and it does not appear that his attention was called to the difference between the English and American statutes. However this may be, the result which he arrived at, so far as it affected the vessel before him, which is the substantial portion of the relief sought to be obtained, was the same as that arrived at by me, and the practice of the two courts will therefore coincide.

An order may be entered in accordance with these views, which will be settled before me on notice to all the libellants who have filed libels against this vessel, in this court.

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crees of this court, made or to be made in any proceeding taken or to be taken in this court, or in any appellate court, to secure the payment of any lien upon the said steamboat, her engines, &c., in place of which this stipulation is substituted, which may have arisen by reason of the collision and fire above referred to, and that in case of default or contumacy on the part of the said owners or claimants, or their sureties, execution or executions, not in all to exceed the amount of this stipulation for the value of said steamboat, viz., \$70,000, with interest thereon from this date, may issue against their goods, chattels, and lands;

Now, therefore, the condition of this stipulation is such, that if the stipulators undersigned shall, upon the final order or decree of the said District Court made and entered in the above suit, and in any suit or proceeding commenced, or which may be commenced, in said court, to establish and enforce any lien or claim upon the said steamboat, &c., by reason of the collision and fire in the aforesaid libel and in the said petition mentioned, or upon the final decree of any appellate court to which any or either of such suits or proceedings may be carried, and upon notice of such order or decree to the parties hereto, or either of them, or to the proctor for the claimants, abide by all interlocutory orders and decrees of the court, and pay the money awarded to the respective parties in and by all such final decrees rendered in this court or the appellate court, (if any appeal intervene,) not exceeding in the aggregate the said sum of \$70,000, and interest, then this stipulation to be void, &c.

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The Cargo of the Mary E. Taber.

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JANUARY, 1867.

## THE CARGO OF THE MARY E. TABER.

CHARTER-PARTY.—DEMURRAGE.—DEFAULT OF CHARTERER.—SUNDAY.  
—LIEN.—EXPENSES OF UNLOADING CARGO.

Where a charter-party specified that the charterer should pay demurrage for detention of the vessel, "provided such detention shall happen by default" of the charterer, and the master having delivered his deck load at one dock, was required by the charterer to deliver the rest at another, (which was according to the custom of the trade,) and lost several days in getting there by reason of the weather,

*Held*, That no demurrage could be recovered under the charter for such detention, nor for Sundays.

Where the charterer had men and carts at the dock on a specified day to receive the cargo, but the vessel did not arrive till two days after, and then the master, without notice to the charterer, discharged the cargo and employed persons to cart it from the side of the vessel up the wharf and there to pile it,

*Held*, That the master could not throw upon the charterer this additional expense, without having first notified him of his intention to land and remove the cargo at the charterer's expense.

This action was brought by John Arnold, the owner of the schooner Mary E. Taber, to enforce an alleged lien upon a cargo of wood transported in that vessel from Holmes' Landing to the port of New York under a charter made with Bonnel, the claimant of the cargo.

The charter-party provided, among other things, for certain lay days in loading and discharging, and for demurrage at a certain rate, to be paid for every day's additional delay, "provided such detention shall happen by default of the party of the second part"—the charterer.

The claim was for \$1,121.50, freight and demurrage, and \$72.25, disbursements. Of this sum, \$772, not really in dispute, had been paid by order of the court after the

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The Cargo of the *Mary E. Taber*.

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commencement of the action, and the controversy was only as to the demurrage and the disbursements.

For libellant, *P. C. Crooke*.

For claimant, *Benedict, Tracy & Benedict*.

BENEDICT, J. Under the proofs in this case the objection to the four days' demurrage while loading, was properly abandoned. To that the libellant is clearly entitled. He is also, in my opinion, entitled to demurrage on the discharging, but not to the full amount claimed. By the custom of the trade, as conceded here, the vessel was bound to deliver the cargo at different places in the port, if requested. The deck load was accordingly delivered at the foot of Canal street, and the remainder at Clinton Avenue dock. No objection was made to going to Clinton avenue, but, on the contrary, the master, rejecting the charterer's offer to get a tug, expressly undertook to procure a tug for himself and tow there from Canal street. Some days were lost, however, in getting there because, as the master says, of the weather. This delay was not caused by any default on the part of the charterer, and under this contract, neither that portion of the detention, nor the detention of Sundays, can be charged to him. (1 *Pars. Mar. Law*, p. 265; *Sprague v. West*, *Abbott R.*; *Towle v. Kettel*, 5 *Cush.* 18.)

One day was also lost by reason of the vessel being aground when ordered to go to Canal street, which must be borne by the libellant. There was some delay at Canal street, which the claimant insists should also be charged to the libellant upon the ground that, by reason of being aground when he received orders, he lost his turn at Canal street. But the delay in getting to Canal street did not, as it appears, prevent the vessel from getting a berth there and being ready to discharge as soon as she



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The Cargo of the *Mary E. Taber*.

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arrived. The only reason why she did not then discharge was, because the dock was full of wood which it was necessary first to remove. The master testifies that this wood which filled the dock at Canal street was not discharged from any vessel which arrived after he had notice to proceed there, and this evidence does not seem to be overborne by the testimony of the claimant. The burden of excusing the delay in receiving the cargo at Canal street was upon the claimant, and no person having been produced from the dock to contradict the evidence of the master, I shall hold the claimants to be responsible for that delay. According to these views the libellant is entitled to recover, in addition to the four days in loading, three days' demurrage in the discharging.

As to the disbursements claimed, the facts are these. On Saturday the charterer designated Clinton avenue as the place of discharging the remainder of the cargo, and the master then undertook to procure a tug and be towed there; and on that day the charterer had men and carts at Clinton Avenue dock to receive the cargo on its arrival. The vessel did not proceed to Clinton avenue until just at night on the following Monday. On Tuesday the berth was occupied so that no cargo could be discharged, and on Wednesday, in the absence of the claimant, and without further notice to him, the master began to discharge the wood upon the wharf, and also employed persons to cart it from the vessel's side up the wharf and then pile and cord it.

The wharf is a long one, where cargoes can only be discharged at the end, and the master testifies: "I carted it for my own necessity, to make room for landing, as a canal boat was discharging at the same time. It would have filled up the wharf, if I hadn't carted it up the wharf. There was no other practicable way. I paid for carting and cording the wood up, \$72.25."

This sum is claimed to be recoverable in this action

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The Cargo of the Mary E. Taber.

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upon the grounds that the disbursement was made necessary by the charterer's selection of such a wharf as the place of unloading.

But the non-delivery of this cargo on Clinton Avenue wharf upon the arrival of the vessel there, did not arise from any peculiarity in the wharf or any permanent obstruction which rendered a landing in the usual manner, within a reasonable time, impossible or improbable. It was simply a case of delay on the part of the charterer to take the wood as fast as landed. For this delay, the charter-party provided, and a compensation for it was fixed, and a lien on the cargo created for the amount. Before the master could justly cast upon the charterer the additional expense of carting away and cording the wood, it was incumbent on him to give a further notice to the charterer of his intention to land and remove the wood at the expense of the charterer. (*The Stephen Crowell, Betts, J.* 1859; *Blossom v. Smith, Nelson, J.* October, 1856.) It is not pretended that any notification of such intention was given in this case, and in the absence of any such notice, I must reject the claim for these extra disbursements, which are not shown to have resulted in any benefit to the claimant, and which arose from the master's taking upon himself a labor not cast upon him by the contract, nor necessary to enable him to reap the full benefit of his charter.

This decision I prefer to rest upon the view here taken of the shipmaster's duty, rather than upon the ground that the disbursement was for service in the nature of stevedore service, and so, according to the decisions, not recoverable in a court of admiralty. But it is proper to add, that a claim for like disbursements was held by Judge Betts, in the case of *Goughran v. 151 Tons of Coal*, 1858, not to be enforceable in the admiralty. See also the *Amaranth, Hall, J.* 1859.

A decree will accordingly be entered in favor of the

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The Steamboat Angelina Corning.

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libellant for the freight and seven days' demurrage according to the rates of the charter-party, with interest, less the sum paid by order of the court.

A reference may be had to ascertain the amount, if it be not agreed on by the parties.

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FEBRUARY, 1867.

THE STEAMBOAT ANGELINA CORNING.

TOWBOAT.—UNKNOWN ROCK IN CHANNEL.—MISFORTUNE.

Where a canal boat was being towed by a steamtug at the end of a hawser, with two other boats, she being the middle one, through the Kills on the north shore of Staten Island, and brought up upon a single rock lying some two hundred feet from the end of a dock, the existence of such rock being proved not to be known to persons familiar with those waters, the tow at the time not being in line with the steamtug, but having sagged off inshore,

*Held*, That a steamtug is not a common carrier of the vessel she tows.

That even common carriers are not held responsible for running upon rocks not generally known, and *a fortiori* steamtugs would not be.

That even though this tow was not in line with the towboat, but had sagged off towards the land, it is immaterial whether this was chargeable to the canal boat or the towboat, for there was nothing to indicate that any danger would be incurred by the sagging of the tow. So long as it was kept at a safe distance from the shore and from all other known objects, there was no negligence in any one which can be held to be the cause of the accident.

That the facts make out a case of misfortune, where the loss must be borne by the vessel on which it fell.

The facts are stated in the opinion of the court.

For libellant, *Owen, Gray & Owen*.

For respondent, *Benedict, Tracy & Benedict*.

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The Steamboat Angelina Corning.

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**BENEDICT, J.** This action is brought by John B. Hinckley, the owner of the canal boat Oswego, against the towboat Angelina Corning, to recover \$2,455 damages, caused by the sinking of the Oswego while being towed through the Kills by the Corning, in May, 1867.

The Corning was bound from New Brunswick to New York with a tow of five boats arranged in two tiers. The first tier was composed of three boats, the Oswego being the middle one. The other two boats formed the second tier. The tide was flood, and the wind blew freshly from the N. W.

After leaving Elizabeth, the tow passed by Shooters' Island on the south side, and then kept towards the Staten Island shore, running along that shore as near as was deemed safe in order to take advantage of the slack water there.

When the tow had reached about up to the ship yard dock, which is to the west of Mushrose reef, and, according to some witnesses, shortly after the steamboat had changed her course to pass across to the Jersey shore, as is usual with such a tide, but, according to others, before the steamboat had made any such change, the Oswego, being the middle boat in the second tier, suddenly brought up hard and fast on a sunken rock whence it was found impossible to pull her off. She was accordingly left a total loss. No other boat was injured.

This rock on which the Oswego struck, as is made very clear by the evidence, was wholly unknown to navigators and to residents of the neighboring locality. It is not laid down in the charts, and there was nothing to indicate its existence to persons in charge of the Corning. Its position has since been ascertained by actual measurement to be two hundred feet out from the corner of the nearest dock, and, on examination, it proves to be a single stone about five feet square, lying several feet under water at the lowest tides. Around it on all sides

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The Steamboat Angelina Corning.

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the water is deep, and the ferry boats and other vessels have been accustomed to pass with safety inside of it wholly ignorant of the presence of such a danger.

No witness says that prior to this accident it was deemed unsafe for vessels to go as near the shore as this tow did, and on this occasion the striking of the canal boat on the rock was the first notice to any one of the presence of any danger.

These facts, and they are not really disputed, make a case of misfortune where the loss must be borne by the vessel on which it fell. The steamboat was not a common carrier ; and to render her liable for the loss of the canal boat, it must appear to have been caused by some negligence on her part. No negligence is here shown. The tow was proceeding at a proper speed where the pilot had a right to suppose it could safely go. No known risk was run, and no needed precaution omitted.

But it is charged that it is the duty of the pilot of a towboat to see that the tow follows straight behind, and that in this case the tow was allowed to hang off some distance to leeward, and thereby the Oswego got upon the rock. Upon the evidence, I am inclined to think that shortly before the Oswego struck, the steamboat had altered her course to pass to the other side of the Kills, and it is quite certain that at the time of striking the tow was hanging off to leeward ; and it is doubtless true, that had it been following directly behind the steamboat, the boats would have passed safely as the steamboat herself did. But whether this is chargeable to the pilot of the steamboat or to the men on the Oswego, is immaterial, for there was nothing to indicate that any danger would be incurred by the sagging of the tow. It is not the case of an undertaking by the pilot to execute an unusual and dangerous manœuvre. Here the Oswego, when she struck, was where, accord-

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The Steamer James Guy.

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ording to all the knowledge possessed by any one, she could safely go. So long as the tow was kept at a safe distance from the shore, and from all other known objects, there was no negligence in any one which can be held to be the cause of the disaster. It was simply running on a rock which the pilot did not know of, and of which on the evidence he cannot be chargeable with knowledge. For running on rocks not generally known, even common carriers are not held responsible. (*Story on Bail*, § 516; *Angell on Carriers*, § 182.) *A fortiori* towboats should not be.

In the case of the *Tempest*, (*Betts, J.*) the towboat was held not liable when a schooner being towed alongside was run on a rock at the foot of Tenth street.

In the case of the *R. L. Stevens*, the same ruling was made, although the stern tow struck a wharf. The present case seems clearly within the principle of those cases, and the result must be the same.

The libel is accordingly dismissed.

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FEBRUARY, 1867.

## THE STEAMER JAMES GUY.

## LIEN FOR MATERIALS.—CREDIT OF VESSEL.—INSOLVENT OWNER.

Where supplies were furnished in Baltimore to a vessel owned in New York, on the order of her owner, who was then present in Baltimore, the work being charged to the vessel on the bills, for which the owner gave time drafts, which contained the words, "Charge to the account of the steamer James Guy," and the owner was insolvent, and was known to be so at the place of his residence, *Held*, That the circumstances showed that the work was done on the credit of the vessel.

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The Steamer James Guy.

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That it was not necessary for the material man to show that the owner was without credit in Baltimore, in order to hold a lien on the vessel for the work.

That the character of the work and the fact that it was ordered by the owner, established that the work was necessary for the vessel.

That the responsibility of the boat for the bills was a feature in the transaction recognized by both parties at the time of contracting the debt.

That proof of the bankruptcy of the owner at the time is sufficient proof of the necessity for the credit to the vessel.

That the libellant, therefore, had a lien on the vessel for his work, unless he had waived it by taking the time drafts.

That the burden was on the claimant to prove that the libellant agreed to receive the drafts in place of the original claim.

That no such proof was furnished.

That the drafts being surrendered in court, the fact that one of them was not due when the libel was filed could not avail to reduce the libellant's claim.

The case of *Pratt v. Reed*, (19 *How.* 359,) commented upon.

The facts of the case appear in the opinion of the court.

For libellant, *Emerson & Goodrich*.

For claimant, *Beebe, Dean & Donohue*.

BENEDICT, J. This is an action brought to recover of the steamer James Guy the sum of \$2,534, being the amount of a bill of repairs put on that vessel in July, 1866, by Young Tall, the libellant. No question is raised as to the performing of the work or the correctness of the amount charged. The sole controversy is whether the facts establish a lien upon the vessel.

It appears in evidence, that the work in question was ordered by George Olney, in Baltimore, where both Olney and the vessel were at that time. Olney was the owner of the boat, and a resident of the city of Brooklyn, New York. The vessel is conceded to have been foreign to the port of Baltimore. The work was commenced on the 17th of July, and soon after it was completed the vessel left Baltimore, and has never since returned. In April following, she came to this port, having shortly

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The Steamer James Guy.

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before been transferred by Olney to his son-in-law, who is the claimant in this action, and who, as I understand the evidence, must be held chargeable with a knowledge of the existence of this demand at the time he took title.

The work was necessary for the vessel in her then business. Its character shows this, and the fact that the owner himself, being then present, directed the work, also establishes this. One test of necessity is, whether a prudent owner would sanction the expenditure. (The *Alexander*, 1 *W. Rob.* 362.)

The work was, moreover, done on the credit of the vessel, and not upon the exclusive personal credit of Olney. Upon this point, the testimony of the libellant is positive. He is supported by the circumstance, that the work was at the time charged to the boat, and not to Olney, on the bills. Olney, the owner, knew that it was so charged, for he received without objection the bills made out against the boat; and two time drafts which he gave for the amount, contained the words, "Charge to account of steamer James Guy." Circumstances like these have repeatedly been held sufficient to show an agreement based upon the credit of the vessel.

Furthermore, Olney himself when examined, does not undertake to deny the statement of the libellant, that the credit of the vessel was relied on, and nowhere says that the work was contracted solely upon his personal responsibility. It is indeed true that, as he says, time was stipulated for and time drafts taken for the amount, but that does not show or tend to show that the responsibility of the vessel was not looked to when the debt was contracted, and the credit of the vessel made a part of the agreement. Time is the very foundation and reason of a maritime lien upon a vessel. The maritime law gives the lien in order that the material man may give time, and so the vessel may proceed to



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make voyages, and earn freight to pay her bills, (The Nestor, 1 Sum. 84.) And provisions for the credit of the vessel, and for delay of payment, are not only not inconsistent with each other, but the latter feature tends somewhat to show the existence of the former in the agreement. The evidence here, if it be not sufficient to warrant finding an express hypothecation of the vessel as security, shows very satisfactorily to me that the responsibility of the boat for the bill was a feature in the transaction, recognized by both parties at the time of contracting the debt, and this being so, according to the general maritime law, as I understand it, a lien was created which a court of admiralty is bound to enforce. And such, it is conceded, would have been the law of this case previous to the decision of the Supreme Court in the case of Pratt v. Reed; but it is contended, that, according to the ruling in that case, this libel must be dismissed, for the reason that it has not been made to appear that at the time of making the agreement in question, Olney, the ship owner, was without credit in Baltimore.

Now with the most sincere desire to give to this and all other decisions of the appellate court their full force and effect as the authoritative guides of the courts below, I find it difficult to consider the case of Pratt v. Reed as deciding more than this: that when the circumstances of the case are such as to raise a presumption that there was no necessity for an implied hypothecation, it then becomes incumbent on the libellant to show a necessity for a credit.

But whether such be or be not the true construction to put upon the decision in the case of Pratt v. Reed, I am quite confident that no such sweeping effect as is here contended for should be given to it.

The claim now is that, under that decision, no matter how insolvent in point of fact the ship owner may be,

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The Steamer James Guy.

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and no matter how devoid of credit he may be in the place of his residence, and no matter what other circumstances attend the contracting of the debt, no implied lien for supplies can ever be held established, in the absence of proof that the ship owner was without personal credit at the time and place of incurring the debt.

Now the opinion delivered in the case of Pratt v. Reed seems to me to indicate that such could not have been the understanding of the court, for if such be the law intended to be declared, it is conceded that it is contrary to the whole current of former decisions upon the subject ; but the opinion contains no intimation of an intention to disturb the adjudged cases. Moreover, the case of the Alexander, cited in the opinion in support of the decision, is adverse to such a view of the law, and the facts of the case before the court called for no such determination.

Such a doctrine would have the effect to enable a ship owner to take advantage of a fraudulent credit, temporarily established in a strange community, to deprive material men of that security which under the real facts of the case the maritime law, looking to the interests of commerce and on the considerations affecting public policy, has always given.

And such is the effect sought here. Olney, the owner of this vessel, who contracted the debt in question, was in fact a bankrupt. In the place of his residence, he was, and had been for years, notoriously insolvent. Over thirty judgments rendered within the past ten years, stand recorded against him in Brooklyn. He was at the time in question so destitute of money that his hotel bill due on his leaving Baltimore, was left partly unpaid. Any personal credit which he might have been able to acquire in Baltimore was wholly fictitious, based upon a concealment of his real position, and at once to be dissipated upon a declaration of the truth. Can

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The Steamer James Guy.

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such a credit, assuming it to have been proved in this case, in justice to the parties or to the community, be availed of by him as a defence to an action like this? I cannot think that the general language of some parts of the opinion of the Supreme Court, in the case of *Pratt v. Reed*, can, with justice to that court, be separated from the facts of the case before it, and considered as decisive of a case like this. My opinion, on the contrary, is, that when the libellant here proved, as he did beyond dispute, that Olney, the ship owner, was in fact bankrupt, without money, he sufficiently proved a necessity for the credit of the vessel. And this I believe to be in accordance with the late decision of Judge Shipman, in the case of the *Neversink*, and with the decision of Judge Sprague, in the case of the *Sea Lark*. (1 *Sprague*, 571.)

The result, then, is that the libellant has a subsisting lien upon this vessel, unless it was waived by the taking of two time drafts for the amount, one at sixty and the other at ninety days. Here the burden is upon the claimant to show that the libellant agreed to receive the drafts in lieu of and in place of the original claim. (The *St. Lawrence*, 1 *Black*, 532.) The drafts were drawn by Olney upon himself, and gave no additional security, and I find no evidence in the case which will warrant the conclusion that the libellant intended by taking them to change the character of the demand from an account against the vessel to an account against Olney personally. Nor do I consider that the fact that one of these drafts had not matured at the commencement of this suit, can be available in reducing the amount of the decree. Both drafts are now due, and both unpaid, and both are surrendered in court; all the delay of payment agreed on has been obtained, and, both drafts having been surrendered, I see no reason why the decree should not be for the whole bill.

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My determination, therefore, is that under the facts of this case a lien is established in favor of the libellant for the amount of his bill, and while it is a satisfaction to me to feel that not only the law but the justice of the case require such determination, it is also satisfactory to know that the amount of the claim is sufficient to enable an appeal to be taken to an appellate court, where any error I may have committed can be promptly corrected.

Let a decree be entered for the amount of the bill, with interest.\*

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MARCH, 1867.

**JOSHUA ATKINS ET AL. v. THE FIBRE DISINTEGRATING CO.**

**ATTACHMENT.—FOREIGN CORPORATION.—AN ADMIRALTY PROCEEDING NOT A "CIVIL SUIT" WITHIN SECTION 11 OF THE JUDICIARY ACT.**

Where a libel was filed against a corporation foreign to the district, and under process issued upon that libel property of the corporation was attached, and a motion was made to set aside the attachment, as contrary to the provision of the eleventh section of the Judiciary Act of 1789,

*Held*, That the words "civil suit" in that section do not embrace admiralty proceedings.

That if they did, the Act of August 23, 1842, and the Supreme Court rules of 1845 must be held to have repealed that section as far as relates to admiralty proceedings.

That the power to attach the property of absent defendants to compel an appearance has always been recognized as within "the course of the admiralty," and the intention to withdraw it or to limit its power will not be inferred from the use of an indefinite phrase.

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\* This decision was affirmed by the Circuit Court, on appeal.

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That the objection to the proceedings based upon the words of the eleventh section of the Act of 1789, is not tenable.

This case came up on a motion to set aside an attachment against the property of the respondents, a foreign corporation.

For the motion, *Beebe, Dean & Donohue*.

In opposition, *Benedict, Tracy & Benedict*.

BENEDICT, J. This motion is brought up in order to obtain of this court its construction of the eleventh section of the Judiciary Act of 1789, as affecting proceedings in admiralty.

The action is against a foreign corporation created by the laws of New Jersey, and the process was served by attaching the property of the corporation found in this district. This attachment the defendants now move to set aside upon the ground that the provision of the eleventh section of the Judiciary Act, which declares "that no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process, in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ," governs proceedings in admiralty.

The question is not new. It has been up in various districts, and has been decided both ways.

In the Southern District of New York, although I find no reported case deciding the precise point, the construction adopted and adhered to for many years has been to consider proceedings in admiralty as not affected by the provision in question.

A construction as firmly fixed as this is in the practice of the Southern District I should feel bound to follow in this district, even if doubt were entertained as to whether that construction would be laid down if the

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question were new ; for the interests of suitors, as well as the convenience of the judges and the bar, require that if possible the practice of the two courts having concurrent jurisdiction over the waters of this harbor should coincide upon a point like this.

But it seems to me that the question ought to be considered settled by authority.

Numerous cases in which the question has existed and where it is not reasonable to suppose that the point was overlooked, have arisen in the Southern District, which have been carried by appeal to the Circuit Court of this circuit, and there the rightfulness of the jurisdiction has been always assumed by both court and counsel. Beyond this, the case of *The New Jersey Steam Navigation Company v. The Merchants' Bank*, decided by the Supreme Court, (6 *How.* 344,) presented the question, but no such point was made or alluded to, either in the opinion of the court or in the three dissenting opinions, although the discussion was upon the subject of the jurisdiction. "A tacit recognition like this is equivalent to an express determination." (3 *Wallace*, 144.)

That the question has been thus passed over, indicates that it has not been considered to be an open one, since the decision of Judge Story in *Clark v. The New Jersey Steam Navigation Company*, (1 *Story*, 531,) and of the Supreme Court in *Manro v. Almeida*, (10 *Wheat.* 473.) These cases with the opposing decision by Judge Hoffman in the California District, (*Wilson v. Peirce*, 15 *Law Rep.* 137,) have moreover been lately considered and weighed by the distinguished author of *Parsons' Maritime Law*, who thus announces his conclusion :

"We do not consider this decision (*Wilson v. Peirce, Hoffman, J.*) to be correct, and have no doubt but that a person who resides out of a certain district may be sued in admiralty in the district, if he has property there which can be attached." (2 *Parsons' Mar. Law*, p. 686.)

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To my mind, the decisions referred to, confirmed by long practice, and supported by an opinion like the one above cited, constitute a weight of authority abundantly sufficient to place the question at rest.

I cannot hope to add anything to the force of the authorities I have referred to, but in view of the late contrary decision in the District of Connecticut which has occasioned this motion, (*Blair v. Bemis, Shipman, J.,*) I shall venture some considerations which seem to sustain the construction of the phrase "civil suit" in the eleventh section of the Judiciary Act as referring to ordinary proceedings in courts of law and equity, and not intended to include causes of admiralty and maritime jurisdiction.

I notice first, then, that in the Process Act of 1789, which was passed but five days after the Judiciary Act, and was doubtless under consideration when the Judiciary Act was passed, admiralty proceedings were not only specially provided for, but they are designated by their appropriate name. It is a reasonable supposition that the same Congress passing the two acts almost simultaneously would have used the same particular and proper designation in the eleventh section of the Judiciary Act, if it had intended there to refer to admiralty proceedings.

Again, the eleventh section of the Judiciary Act gave rise to difficulties which it was found necessary to remedy, and the first section of the Act of February 28th, 1839, was passed for that purpose. (*Law's U. S. Courts*, p. 84.) But this latter section is only made applicable to "suits in law or in equity," although the same difficulties would arise in admiralty proceedings if such proceedings were within the provision of the eleventh section. The studied omission of admiralty proceedings from the effect of the remedial section of the Act of 1839, shows, therefore, that those proceedings were not then considered as having

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been affected by the provision of the eleventh section sought to be remedied.

Indeed, in any properly drawn statute admiralty proceedings, when referred to, will be in some way specially designated, and they are so designated in very many if not most of the statutes heretofore considered as covering them. For instance, the Act of Aug. 21, 1862, (12 *Stat. at Large*, p. 588.) They are proceedings so diverse in form and in spirit from ordinary civil suits, and are applicable to classes of property, of persons, and of obligations, so peculiar in their character and their necessities, and are so seldom in the mind of the law makers in passing general statutes, that it seems to be proper to hold as a general rule of construction that, unless alluded to by name or otherwise necessarily within the provisions of any particular statute, such proceedings will be deemed excluded.

Certainly great confusion will arise if in the numerous statutes now being enacted, affecting new classes of industry and of persons, and providing new forms of remedy, admiralty proceedings are to be considered as referred to whenever the words "suit," "civil suit," or "civil action" are used.

Take as an illustration the Act of May 4, 1858, (11 *Stat.* 272,) which requires residence in the district to give jurisdiction in suits in this and many other States, and its effect upon the well known admiralty proceeding *in rem* against the ship and *in personam* against the master under the same libel and process, a proceeding often necessary to a proper administration of the maritime law. If the word "suit" in the Act of May 4, 1858, covers causes of admiralty and maritime jurisdiction, this proceeding is substantially destroyed, for it is seldom indeed that the ship is to be found in the district where the master resides.

Take also the more important admiralty proceeding



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to obtain possession of a ship, which is a proceeding *in personam*. (22 *Ad. Rule*; *The S. C. Ives, Newberry's R.* 214.) What, under the construction contended for, is to be done when the residence of the defendant is in one district and the ship to be seized and delivered is in another?

Is it possible that embarrassments like these and those others which are indicated by the Act of February, 1839, as having arisen in ordinary civil suits, have existed in admiralty proceedings from 1789 to this day, without attracting attention and calling for remedy?

There is still another aspect to this question. By the Act of 1842, authority was given to the Supreme Court to provide, regulate, and alter proceedings in admiralty, under which authority the general admiralty rules were promulgated by the Supreme Court in 1845. Now these rules, which are held to be effective as statutes, seem to ignore the provision of the Judiciary Act in question, and authorize service of admiralty process by the attachment of property in all cases where the defendant cannot be found.

Even if then the terms of the limitation of the eleventh section of the Judiciary Act were to be held to cover admiralty proceedings, the Act of 1842 and the rules of 1845 taken together would be effective as a repeal of the provision so far as applicable to admiralty proceedings.

Such an effect was given to these rules by Judge Betts in regard to the important Act of January 14, 1841, abolishing imprisonment for debt "on process issuing out of courts of the United States." (*Gaines v. Travis, Abbott R.* 431.) And the decision was confirmed by the action of the Supreme Court in amending the rule.

Moreover, these rules are intended to be and are but the embodiment, for the sake of uniformity in the various districts, of most ancient and important modes of proceeding—adapted to meet the peculiar necessities of ships and of commerce on the sea—substantially the same

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in all maritime countries and known as "the course of the admiralty."

They are one of the special characteristics of causes of admiralty and maritime jurisdiction, causes which do not differ from ordinary civil suits so much in the law to be declared as in the way in which it is administered.

These methods and modes of proceeding are the life of the admiralty. They constitute an essential part of the jurisdiction which the grant of the constitution secures to the National courts, and when the District courts were constituted courts of admiralty they acquired the right to those methods and modes, among which has from the first been the power to seize property of defendants who cannot be found, and to compel an appearance. This power is recognized by the Admiralty rules as existing in these courts; it has never been conferred upon any other tribunal, and any intention to place it in abeyance, or to limit its exercise, when entertained by the law-making power, will, it may well be supposed, be clearly expressed and not left to be inferred from the use of a general and indefinite phrase.

It may be added, in conclusion, that no inconvenience or injustice is known to have been caused by the exercise of this power by the District courts, and it is believed that a withdrawal of it now would be deemed a misfortune to the classes of interests to be affected thereby.

If either from changes in the habits of commerce, or from modifications which are found necessary and become fixed in the practice of admiralty courts of other countries, or from changes in the spirit of our institutions, a limitation of the mode of exercising this power shall become necessary or proper, it is not to be doubted that the Supreme Court as the high appellate court of admiralty, and as empowered by the Act of 1842, will effect

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Fifteen Empty Barrels.

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a change in this particular as it most properly did in regard to the power of imprisonment.

The objection to the proceedings based upon the eleventh section of the Judiciary Act of 1789, is therefore held to be untenable, and the motion to set aside the attachment on that ground is denied.

APRIL, 1867.

FIFTEEN EMPTY BARRELS, &c.

INTERNAL REVENUE SEIZURE.—COSTS.—WATCHING SEIZED PROPERTY.—DUTY OF COLLECTOR ON A SEIZURE.

Where a collector of internal revenue seized property as forfeited, and did not turn it over to the district attorney to have proceedings commenced, for thirty-seven days, and the property being forfeited, the collector presented for taxation a bill for watching the property while in his custody, at \$5 per day, as being the "cost of seizure," within the ninth section of the Internal Revenue Act of July 13, 1866; but no facts were stated to show that the interests of the government required the delay in the prosecution,

*Held*, That the language of the section in question covered any necessary expenses of watching property seized by a collector, for such time as should necessarily elapse between the seizure by the collector and that by the marshal under process.

That it is the duty of a collector on seizing property, forthwith to turn the case over to the proper law officer of the government.

That in this case twenty-four hours was sufficient time for that purpose, and the expense of watching it for that period is all that can be taxed.

That, unless under special circumstances, the rate cannot be greater than that allowed to the marshal.

For the United States, *B. F. Tracy, U. S. District Attorney.*

BENEDICT, J. This case comes before me upon a question of costs. It appears that the property condemned

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in the cause was seized by Collector Wood on the 5th day of December, 1866, as forfeited for a violation of the Internal Revenue laws. The property remained in the hands of the collector until the 12th of January, when the case was turned over to the district attorney, an information filed, and the property condemned, no one appearing to defend.

The collector now presents for taxation a bill of costs of \$185, which is supported by his affidavit that he has paid or has obligated himself to pay that sum to one Nathan Beers, for watching the property while in custody of the collector, at the rate of \$5 per day.

The language of the section of the Internal Revenue Law under which the claim is made is as follows: "The cost of seizure made before process issues, shall be taxable by the court." (14 *Stat. at Large*, p. 110.)

This language can, I think, be properly construed to cover any necessary expenses of watching property seized by a collector, for such time as shall necessarily elapse between the seizure by the collector and the seizure by the marshal under process. But I am unwilling to extend its effect so as to cover a charge like the one before me.

The duty of a collector upon making a seizure of property which he has probable cause to believe liable to forfeiture, is to turn the case over to the proper law officer of the government forthwith, in order that legal proceedings may be commenced without delay.

This is also the right of the citizen whose property is seized, and who may justly complain if his property be detained for any considerable time, when he can neither take steps to make his defence, nor to obtain its release upon giving bonds.

Any other practice is liable to abuse, and to bring suspicion and discredit upon the Revenue Department, and will never be encouraged by me.

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In the case before the court, the property was detained by the collector for the space of thirty-seven days, and no other reason is suggested for the delay, except that Revenue Agent Linton, and Inspectors Cocheu and Meade desired proceedings to be delayed. But no facts are presented before me to show that the interests of the government required any delay at all, and it is not easy to imagine any proper reason for delaying proceedings in a case so clear that the owner deemed it not worth while to interpose any defence.

In such a case my opinion is that no more than twenty-four hours' delay was necessary, and expenses for custody of the property for that period is all that can be taxed as cost of seizure.

I notice also that the rate charged per day is double that allowed by law to the marshal in such cases. Unless under special circumstances of necessity, but \$2.50 per diem is allowed to the marshal, and no greater rate can be claimed by the collector in this case.

Let the bill be taxed by the clerk in accordance with this decision, and the amount so taxed be paid the collector.

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*The Steamer Circassian.*

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APRIL, 1867.

**THE STEAMER CIRCASSIAN.\***

**CONFLICT OF JURISDICTION.—MARSHAL'S RETURN.—VOID WARRANTS.  
—ACTUAL CUSTODY BY OFFICER.—INTERVENTION BY SHERIFF  
CLAIMING POSSESSION.**

A vessel was seized by a State sheriff under a State lien law. Afterward, process was issued against her in the United States District Court, in a suit on a bottomry bond. The proceedings in the State court having gone to a sale, the purchaser, who had paid twenty per cent. of the purchase money, but had not completed the purchase, applied to the District Court for an order directing the marshal to surrender the vessel to him,

*Held*, That the purchaser was not in a position to ask such an order, having bought her with full knowledge of the admiralty proceedings, not having completed his purchase, and not averring that the sheriff could not or would not put him in possession on his completing the purchase.

That the question whether the custody by a sheriff of a vessel under a writ alleged to be void, is such as to prevent a court of admiralty from acquiring jurisdiction of the vessel, is one which should not be determined on motion.

Cases of *Taylor v. Carryl*, (20 How. 583,) and of the *General Smith*, (4 *Wheat.* 488,) commented upon.

Where a marshal who had process against a vessel, made return that he had attached her, but that previous to his attachment she was in custody of a State sheriff, and where it appeared that, of the warrants under which the sheriff held the vessel, all that were in his hands at the time of the alleged attachment by the marshal were afterwards declared void for want of jurisdiction, and the libellant thereupon applied for an order to compel the marshal to amend his return by striking out all reference to the custody of the sheriff,

*Held*, That the marshal is responsible for the execution of the process put into his hands, and should be left free to state what he does with it, subject to that responsibility, and that the court therefore would not interfere.

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\*I have deemed it advisable to report the various and complicated proceedings connected with this steamship together, departing in this instance from the exact chronological order of the reports, because I have thought that the proceedings would be thus more easily followed.

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Where a question arose between the marshals of the Southern and Eastern Districts of New York, as to which made the first seizure of a vessel in waters over which both District courts exercise concurrent jurisdiction, and on a petition by one marshal to the court to have the other give up the custody of the vessel to him, the court heard evidence as to which seizure was prior,

*Held*, That such a question was more properly raised on a petition by the marshal, than on a plea to the jurisdiction by a party in whose favor the marshal held process.

That as long as one court of competent jurisdiction has custody of property, no other court of concurrent jurisdiction can acquire jurisdiction of it.

That the custody of the law, having been once fixed by the valid levy of an officer duly authorized to seize, continues whether the officer be present or not, unless acts equivalent to a surrender and withdrawal are shown.

That on the facts, the petitioning marshal did not have the prior seizure.

That a marshal's return stating a seizure of the vessel, but that at that time the vessel was in custody of a State sheriff, does not imply any such seizure as would make the marshal responsible, or would give the court jurisdiction.

Where a libel was filed on a bottomry bond, on which process was issued and returned, and on the return a State sheriff filed a claim and answer, setting up that he was in custody of the vessel at the time of the alleged seizure by the marshal, and the libellant moved to strike out the claim,

*Held*, That the power of the sheriff to bring, in this way, proceedings in a State court, before a United States court for adjudication as to their validity, is doubtful,

That where a conflict of this sort arises between a sheriff and a marshal, the sheriff has two courses open to him, either to apply to the State court to be protected, or to apply by petition to the Federal court to order its officer to withdraw.

The sheriff's answer stricken out, and leave given him to apply by petition.

On the 21st of September, 1866, the steamship *Circassian* returned to the port of New York, from a voyage to Antwerp. Previous to her departure from New York, she had been owned by William Salem of that city, who had mortgaged her to Ernest Fiedler, for \$90,000, and had subsequently conveyed the title, subject to the mortgage, to the Continental Mail Steamship Company. When she sailed on that voyage, there were bills against her for supplies, &c., for which specifications of lien had been filed against her under the lien law of the State of New York. (*Session Laws of 1862*, p. 956.)

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While she was in Antwerp, a bottomry bond was executed by her master to Jonathan R. Bischoffsheim. In Halifax, on her return home, another bottomry bond was executed to Edward Ounard. Before she returned to New York her owners had become insolvent, and on the day of her arrival she was seized by the sheriff of the city and county of New York, under a warrant issuing out of the Supreme Court of the State of New York, to enforce a claim of Benner & Burr, who had filed specifications of lien as above stated.

Similar attachments were afterward issued to the sheriff, as follows :

September 24th, in favor of Alex. Irwin.

September 28th, in favor of Zeno Secor.

October 9th, in favor of James Shaw.

October 10th, Horatio G. Seeber.

Several other attachments were afterwards issued, but need not be specified.

On October 30th, the sheriff made a sale of the vessel under the warrant in favor of Benner & Burr, and Appleton Sturgis became the purchaser at the sale, and paid twenty per cent. of the purchase money. He, however, declined to complete his purchase, and, on his motion, the Supreme Court on November 8, 1866, set aside the sale for want of jurisdiction to issue the warrant (the affidavit on which that warrant was issued not complying with the requirements of the statute), and ordered the twenty per cent. to be refunded.

The affidavits on which were issued the warrants in favor of Irwin, Secor and Shaw, contained similar defects.

On November 23, 1866, the sheriff made another sale under the Seeber warrant, and Sturgis again became the purchaser, and paid twenty per cent. of the purchase money, but never completed the purchase.

During this time, proceedings against the vessel had been taken in the United States District courts of both



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the Southern and Eastern Districts, the vessel lying in the waters of the city of New York, which are by statute within the jurisdiction of both those courts. (13 *Stat. at Large*, p. 438.)

The proceedings in the Southern District were as follows:

On September 25th, Bischoffsheim filed his libel in the Southern District to enforce his bottomry bond. Process against the vessel was issued to the marshal of that district on that day, returnable on October 16th.

On October 2d, Cunard filed his libel in the Southern District to enforce his bottomry bond. Another libel was also filed the same day, and process was issued to the marshal on that day on both libels.

On October 16th, the marshal returned the process in the Bischoffsheim case, with the following return: "In obedience to the within monition, I attached the steamship or vessel called the *Circassian*, her tackle, &c., therein described, on the 25th day of September, 1866, and have *not* given due notice to all persons claiming the same that this court will, on the 16th day of October inst. (if that should be a day of jurisdiction; if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same. *Previous to my attachment the vessel was in custody of the sheriff of the city and county of New York, under various attachments issued out of the State court.* ROBERT MURRAY, United States Marshal." This return being made, proceedings in the cause were postponed from time to time.

The returns to the other processes were subsequently made in similar form, differing only in the dates of the service, and proceedings on these processes were also postponed.

On November 18th, by order of the court, the marshal made a special return of his proceedings in all the suits, which was similar in form to the other returns,

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but which fixed October 2d as the day of the service of the Bischoffsheim process.

On November 20th, an alias process was issued in the Bischoffsheim case, and a return was made of its service on the same day, the return being otherwise similar to the one given above.

In this position of the matter, Sturgis, who, as above stated, had purchased the vessel at the sheriff's sale on November 23d, presented to the District Court of the Southern District a petition setting forth the proceedings under the State law, and that, by virtue thereof, the sheriff seized this vessel on the 21st day of September, and continued in possession up to the sale to the petitioner; that the marshal of the Southern District claimed also to have taken possession of the vessel under the admiralty process in these causes, and claimed to have said vessel in custody, or to be entitled to the custody thereof; also, that the petitioner was ready to pay the balance of his bid to the sheriff, and was advised and believed that the sale by the sheriff passed to him a valid title to the vessel, free from all claims; wherefore he prayed that the vessel might be discharged from the custody of the marshal, and that the marshal might, by an order of this court, to be entered in these causes, be directed to surrender the possession of the vessel to him.

*T. E. Stillman* and *Wm. Allen Butler*, who appeared in support of the motion, argued that the case of *Taylor v. Carryl* had settled the law, that where a sheriff had possession of a vessel under a warrant from a State court, a United States marshal could not execute any process against her, and that the marshal's own return here showed that the sheriff was in such possession when the marshal undertook to attach, and that, therefore, the marshal never did or could attach, and should be di-

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rected by this court not to keep up the semblance of an attachment upon the vessel.

In opposition to the motion, *J. Larocque*, after arguing that the Irwin warrant, issued September 24th, under which the sheriff claimed to have been in possession on the 25th of September, when the process was issued to the marshal, was void for defect in the affidavit on which it was granted, argued the following points :

1. It has been held, that it is the right and duty of the court of the United States to enforce its possession when it is prior, as against a State officer. (*Slocum v. Mayberry*, 2 *Wheat*. 1.)

2. The warrant being void, it follows, that when the vessel was attached and seized by the marshal under the process in this action on the 25th September, the sheriff was not in possession *qua* sheriff, and held no legal or valid process. His presence was, therefore, no more an obstacle to the taking possession by the marshal than that of any other individual could have been.

3. The present, moreover, is not an application by the sheriff complaining of interference by the marshal. It is a petition of Appleton Sturgis claiming to be a purchaser, not under process issued prior to the attachment by the marshal in this suit, but under process confessedly issued only on the 10th of October.

The petitioner makes the effort to tack the possession under this warrant of the 10th October, subsequent to the attachment by the marshal under the process in this action, to a prior alleged possession under other warrants. This he could not do even if those prior warrants were valid.

4. Mr. Sturgis, moreover, has become the purchaser under the sheriff's sale, and has not yet completed his purchase. He comes to the court in advance of doing so to obtain from it a judicial declaration by order

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that the marshal was not lawfully in possession before the right to take possession accrued to the sheriff under the warrant under which he purchased, for the purpose of concluding the libellant here on the question of jurisdiction in this suit. He has not even a standing in court for such an application. He is not owner of the vessel, and could not appear even to claim her in the ordinary way. (*Rule 26 of the Supreme Court in Admiralty.*)

5. If, therefore, the court is satisfied that the marshal has the lawful possession of the vessel under the process in this suit, it is its duty so to declare and to enforce it. In any event, however, there is no state of facts shown which prevents the sheriff claiming to be in possession from delivering his bill of sale to the petitioner, and doing every formal act necessary to the delivery of possession. If in law the marshal is not in possession or entitled to possession on the facts shown, his process remains in abeyance until the possession of the sheriff has ceased. The return of that process on the 16th of October, stating that *before* he attached on the 25th of September the sheriff *was* in possession, does not interfere with the lawfulness of his possession from the time of the original attachment which he returns upon the facts now shown; and this case differs from those of *Taylor v. Carryl* (20 *Howard*, 583), *Freeman v. Howe* (24 *Howard*, 450,) and *Buck v. Colbath* (3 *Black*, 334), in the essential particular that here has been no attempt as in those cases to proceed to adjudication *in rem* before the property shall be in the undisputed possession of the marshal of this court, and thus clearly under its jurisdiction.

6. This being an admiralty suit *in rem* to enforce the *lien* of a bottomry bond upon the vessel given by the master in a foreign country, the jurisdiction in admiralty under the constitution and laws of the United States is

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exclusive. The distinction between cases where it is exclusive of, and where it is concurrent with that of the State courts, is that it is exclusive where that of the British court of admiralty was so at the time of the Revolution, and concurrent in cases where the courts at Westminster exercised concurrent jurisdiction at that time; and at that time they did, and both in that country and this they have ever since exercised exclusive jurisdiction of an action *in rem* to enforce the lien of a bottomry bond. It is not material to inquire whether a court of common law has or has not concurrent jurisdiction of an action *in personam* against the owner or master of a vessel on a bottomry bond for substruction of the security, or after it has become absolute and when there is a personal covenant to pay. (*Constitution of the United States*, Art. 3, § 2; *Judiciary Act*, § 9 (1 U. S. Stat. 76); 1 *Peters' Admiralty Decisions*, 91, 92, 93; 1 *Peters' R.* 545; 1 *Sumner*, 400, *The Volunteer*; 16 *Johns.* 327; 1 *Wheaton*, 304, 335; 1 *Kent's Com.* 318, 319; 18 *Johns.* 392; *Doug.* 594; *Menetone v. Gibbons*, 3 *Term R.* 267; *Ladbroke v. Orickett*, 2 *Term R.* 649; *Buggin v. Bennett*, 4 *Burr.* 2035; *Blacquiere v. Hawk*, *Doug.* 378.)

7. If, however, the State courts could exercise concurrent jurisdiction, the jurisdiction in this court has already attached by the filing of the libel to enforce the bottomry bond. Even if the libellant might have availed himself of the provisions of the act of the Legislature of New York of April 24, 1862, entitled "An act to provide for the collection of demands against ships and vessels (*Session Laws of 1862*, ch. 482), he has not chosen to do so. That act, whenever any lienholder under the State law originates proceedings, assumes to foreclose by those proceedings and to cut off, in favor of the claims of citizens of New York against the vessel arising in this State, whether prior or subsequent, every other lienholder having a claim, whether of exclusive admi-

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ralty jurisdiction, or concurrent admiralty jurisdiction, except seamen having claims for wages. (§ 1, subd. 5.) The act in this respect is a plain infringement of the jurisdiction of the Federal courts in cases of admiralty conferred by the constitution of the United States, and void. It is to the *suitor* in admiralty that the United States Judiciary Act saves a "common law remedy in all cases where the common law is competent to give it"—not to the *defendant* or *respondent*. It is the *suitor* who is entitled to exercise the option as to the forum, where one exists. With that single saving, the jurisdiction of the admiralty is expressly made exclusive of the State courts. And even that saving is fully satisfied by the construction *that the common law remedy must be sought in the Federal court and not in the State court*, and full effect cannot be given to all the language of the section by adopting any other construction. (*U. S. Judiciary Act*, § 9; 1 *U. S. Stat.* 76.)

8. The present motion, moreover, under color of that act of the Legislature of New York, undertakes to deprive this libellant, who is an alien, of his right of proceeding in the Federal court against a domestic ship owned by citizens of New York, and claims to abrogate the plain language and import of the contract of bottomry executed in the foreign port of Antwerp.

9. The State law also seeks to reverse the well-established rule of the general maritime law of the world, that a bottomry bond is entitled to a priority in payment over every other claim against the ship, and successive bottomry bonds in the inverse order of their dates and of the exigencies calling for them, the last given being entitled to be first paid. This State law postpones them all to claims of its own citizens under liens acquired prior or subsequently, in the ship's home port, as against a foreigner acquiring a lien in good faith

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in a foreign port, and in reliance upon the general maritime law adopted expressly by the constitution, laws, and decisions of the courts of the Union, but attempted to be set aside by this State enactment.

10. The court will, moreover, not pass upon such a question adversely to the libellant on motion. It would be in effect deciding against him a jurisdictional question involving that of the continuance of his lien under the bottomry bond, in a form which would deprive him of his right to appeal to the Supreme Court of the United States. The petitioner should be left to set it up by claim and answer in this suit.

The prayer of the petitioner should therefore be denied with costs, and the order should declare that the marshal has possession of the vessel under the process in this action in law and in fact.

In behalf of Cunard, the other bottomry bondholder, *G. D. Lord* also presented a brief, but cited no other authorities than those cited above.

The following decision was rendered on December 24, 1866 :

BENEDICT, J. I fully appreciate the unfortunate position of this steamer, and have considered with care the reasons which are urged in support of this petition. The impressions formed upon the argument are, however, confirmed, and I am satisfied that the motion should be denied. In the first place, the petitioner is not in a position to entitle him to ask such an interference of this court. He is simply a bidder at the sheriff's sale, who has not yet completed his bid. He bid off the vessel with full knowledge of the admiralty proceedings against her. He avers in his petition that he is advised and believes that if he completes his purchase he will receive a valid title to the vessel. He does not aver that

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the sheriff is unable or unwilling to put him in possession on receipt of the balance of the purchase money. It is not seen how a party so situated can ask this court to direct the marshal to surrender to him the possession of the vessel. If the action of the marshal had been such as improperly to delay or embarrass the proceedings before the State officers, the State court was competent to protect its officer and its custody of the vessel, if such it claimed to have; and the sheriff in such case might perhaps with propriety have applied to this court to restrain any unlawful action of the marshal. It might also be that the owners or creditors of the vessel could have applied to forbid action, on the part of the marshal, which was likely to prevent realizing a full price from the sheriff's sale. But since the service of the process by the marshal, proceedings in admiralty have been stayed; the proceedings under the State law have gone on: the vessel has been sold by order of the State officer, and, for aught that appears, for a full price, under notice of all that has been done or is claimed in the admiralty causes. Neither the sheriff, nor the owners, nor the creditors, complain of any improper exercise of the powers of the officer of this court. How, then, can the petitioner, who has suffered no injury, and may never have any interest in the vessel, ask this court to interfere in his behalf?

There is another reason for denying this application, which is, that it raises a question which should not be adjudicated upon a motion. That question is, whether the custody of the sheriff, by virtue of a statute, is sufficient to prevent the court of admiralty from acquiring jurisdiction for any purpose during the custody of the sheriff, although the officer issuing the warrant to the sheriff had failed to acquire jurisdiction, and the proceedings before him were void. Such is claimed to be the nature of the sheriff's custody in this case; and it appears that the first proceeding taken before the State



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officer has been declared void by the State tribunal; that the second contains the same defect, and that the third and only other proceeding, previous to the marshal's attachment, is open to objections which may prove equally fatal. It is also to be noticed that the order of sale made by the State officer, under which the petitioner claims, was not made in either of the proceedings commenced before the marshal's attachment, and that it recites that the sheriff seized the vessel on October 10th, which was subsequent to the marshal's attachment.

Now, I do not decide that the proceedings in the State' tribunal are void for want of jurisdiction; nor do I examine those proceedings further than to see that the objections taken to the jurisdiction are not frivolous, but simply determine that such a question as this petition raises, and on which the rights of these bottomry holders depend, if the theory of the petition be sound, should not be disposed of in a summary manner, on a motion which cannot be reviewed on appeal.

If there was no ground to contend that the case raised any other question than the one decided in the case of *Taylor v. Carryl* (20 *How.* 583), on which the petitioner relies, it might, perhaps, be the duty of the court to end the controversy now. But the case is not identical with the case of *Taylor v. Carryl*. In that case, the prior custody was the custody of the Superior Court of the State, whose jurisdiction was conceded. The question was one of title, and what the court decided was, that a title derived from the sale of the vessel, as perishable, by a Superior Court of the State in a valid proceeding, made after the marshal had retired, and when the custody of the State court had been actual and continued, was a better title than one dependent on the marshal's seizure in the admiralty proceeding.

It may be, that for the same considerations which influenced the high tribunal which decided *Taylor v.*

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Carryl, it must also be held in this case that the custody of any State officer, whether acting with or without jurisdiction, is sufficient to oust the jurisdiction of the admiralty, even in an action like the present, where its jurisdiction is exclusive. But in the absence of any such decision by the Supreme Court, and in view of the effect of such a decision in cases of prize, in cases under the Revenue and Neutrality Laws, and in this case, where the result, claimed by the petitioner to follow, would be to supersede the bottomry bonds by the prior State liens, and in effect destroy them, I do not feel bound so to decide on a motion like this, and enforce the decision by a final order directing the marshal to surrender possession to the petitioner.

So far this application has been treated as an application for the interposition of the court to avoid a conflict between Federal and State authority; but it is not quite clear that the petition presents a case of conflicting jurisdictions. The averment of the petitioner is, that the proceedings before the State officer have gone to a sale of the vessel to him, and that the sheriff continued in possession, from his first seizure "up to the sale to the petitioner." There is no definite averment of any custody by the sheriff since the sale, and the prayer is, that the marshal deliver the vessel, not to the sheriff, but to the petitioner. It would not be a very strained construction of this petition, which is certainly ambiguous, to hold that it showed no conflict between the marshal and the sheriff, but that the controversy now lay between the bondholders and the buyer at the sheriff's sale. If such be the nature of the controversy, no reason is discovered for determining it by a summary order like the one prayed for.

In dismissing this application, I venture to add to these remarks a single observation, in the hope that the attention of the appellate court, before which this case will doubtless come, may be called to it.

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The source whence such conflicts as the present, in regard to liens upon ships arise, is the distinction between foreign and domestic vessels, laid down in 1816 in the case of the *General Smith*. (4 *Wheat*. 438.) It is that decision, long considered by many able lawyers to be without solid foundation, which compels resort to State lien laws, and gives birth to statutes like the one here involved—a statute which assumes to foreclose and cut off by proceedings in the State court all other lien creditors except seamen, including those having claims of exclusive admiralty jurisdiction—a statute which creates a sort of State admiralty, liable at all times to be brought in conflict with the National courts, to which the admiralty and maritime jurisdiction has been intrusted under the constitution—of which statute I speak the more fully, as many of its features originated with me, when acting as a member of the Legislature which passed it. Such laws are now deemed necessary to obviate the consequences of the decision in the case of the *General Smith*, but they would seldom or never be resorted to if the distinction of the *General Smith* could be reconsidered, and it be held that, “it is the ship, and not the ship of a particular owner, nor the ship of a particular flag, or national character; not a domestic ship, nor a foreign ship; not a ship in a port of a State to which she does not belong, or in which her owner does not reside; but a *ship*, every ship, that is bound for the bill of lading, the charter party, the wages of the seamen, repairs, supplies, materials, and maritime loans.”

Application denied.

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After this petition of Sturgis was thus disposed of, Bischoffsheim applied to the District Court of the Southern District for an order directing the marshal to amend the return in his action by striking out of it all

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reference to the prior attachment by the sheriff. This application was based on affidavits to show that the warrants held by the sheriff on September 25th, the day when the process was served by the marshal, were void for want of jurisdiction.

*J. Larocque* appeared in support of the motion, which was opposed, in behalf of the parties who held the State attachments, by *W. R. Beebe*, *R. D. Benedict*, and *Wm. Allen Butler*.

Judge Shipman, before whom it was heard, rendered the following decision in January, 1867 :

SHIPMAN, J. I have given the questions involved in this motion, and those with which they are necessarily and directly connected, an extended and a careful consideration, and am of opinion that this motion, so far as it calls upon the court to direct the marshal to amend his return to the process, should be denied.

There are serious and almost unsurmountable objections to the court's dictating to the marshal what return he should make in any given case touching the facts to which the return properly relates. The marshal and not the court is responsible for the execution of this process, and he should be left free to state what he does in the premises subject to his responsibility to the law under which he acts. These remarks refer to the material facts touching an officer's action, and not to the mere form of the return. In the case of *Wortman v. Conyngham* (1 *Pet. C. C. R.* 241), Mr. Justice Washington, after argument of a rule to show cause, took the same view even as to a return on an execution. Much more should it apply to *mesne* process. If the marshal desires to amend his return, he will be permitted to do

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so, the court reserving all questions as to law or fact which may arise in the further progress of the cause.

Motion denied.

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After the above motion, no further proceedings were taken in the Southern District, the activity of the litigation being transferred to the Eastern District.

The proceedings before the District Court of the Eastern District were as follows :

On the 27th day of September, two days after the filing of the first libel in the Southern District, a libel was filed by C. K. Porter and others, seamen on board, to recover wages, and process *in rem* was issued. Thereafter three other libels, also for wages, were filed, the claims in all amounting to some \$6,000. To the first of these processes the marshal made return that he had seized the vessel on the 27th of September, and given due notice to all parties to appear ; and to the others a like return, except as to date. The return made no reference to any possession by the sheriff or the marshal of the Southern District, and the marshal claimed that there was no such possession at the time of the service of this process.

No one appearing to contest these claims, decrees were in due course entered by default, condemning the vessel. Subsequently, on application of Edward Cunard, who had filed the second libel in the Southern District, and also on application of Ernest Fiedler, the mortgagee of the vessel, the defaults were opened, and, claims and answers being duly filed, the causes were placed on the calendar, and thereafter called in their order for hearing, when it was suggested that this court had no jurisdiction of the vessel for the reason that on the 27th of September, when the process of this court was served,

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the vessel was in the custody of the marshal of the Southern District.

Upon this suggestion, the hearing of the causes was postponed, and leave given to raise the question suggested by proper averment, and a day set for its determination.

The leave thus given was never availed of, and the causes subsequently proceeded to trial on their merits, without objection, and after consideration decrees were rendered in favor of the libellants, according to which a *venditioni exponas* was issued to the marshal, and the vessel advertised to be sold at the foot of Joralemon Street, Brooklyn, where she then lay.

In none of these actions in either court did any owner appear to claim the vessel.

It was always insisted by the libellants in this court, and by the marshal of the Eastern District, that after the 27th day of September the vessel was always in his manual possession and under his actual control.

Matters being in this position, after the denial of the motion to compel the marshal of the Southern District to amend his return, an application was made to this court, on behalf of Bischoffsheim, to open the default in the seamen's wages suit, and to allow him to file a plea to the jurisdiction of the court, he claiming that this court never acquired any jurisdiction, because at the time of the alleged seizure by the marshal of this district the vessel was in custody of the marshal of the Southern District.

The court intimated that such a question would more properly be brought up by an application in behalf of the marshal of the Southern District to remove the marshal of the Eastern District. Accordingly the marshal of the Southern District filed a petition, stating that he attached the vessel on September 25th, and had been interfered with by the marshal of the Eastern District, and praying this court to have the "priorities of the

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respective attachments and of the jurisdictions of the courts of the respective districts investigated and determined by this court."

Notice of hearing on this petition was ordered to be given to the libellants in this court, and the hearing was brought on before the court.

*Mr. Larocque* appeared for *Mr. Bischoffsheim* and for the marshal of the Southern District.

*Mr. Vanderpoel* appeared for the sheriff of New York, and said that he had just heard of the proceeding, of which he had had no notice, and if the sheriff was to be prejudiced by it he should wish to be heard in the matter. It was stated, however, that the sheriff would not be affected by this proceeding, which was to affect the two marshals only, and *Mr. Vanderpoel* withdrew.

In support of the petition, *Mr. Larocque* put in evidence the libel of *Mr. Bischoffsheim* in the Southern District and the process issued on it, on the 25th of September, with the return of the marshal of the Southern District upon it, that he had on that day attached the vessel, and that previous to his attachment the vessel was in the custody of the sheriff of New York.

*Mr. Hill*, who appeared for the libellants, put in evidence the special return made by the marshal of the Southern District in all the cases in that district, in which he returned that he attached her on the 2d of October, and previous to his attachment she was in custody of the sheriff, &c. ; and the alias process issued in the *Bischoffsheim* case, with the marshal's return on it, that he had attached the vessel on the 20th of November, and previous, &c.

*Mr. Larocque* then put in evidence the proceedings in the State attachments, and rested.

*Mr. Hill* also rested.

*Mr. Larocque* then insisted that the court in this state of the case, must decide that the marshal of the

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Southern District had the custody ; that he had returned that he had it, and an officer's return was conclusive. He added that he had understood that evidence was to be given that no one was on board the vessel at the time the marshal of the Eastern District made his arrest of her, and he had come with witnesses to give testimony on that point ; but none had been given on the other side, and he supposed the court would at once pass on the case without his calling them.

The judge said he should pass on the case on the evidence which parties put in, but they must themselves decide as to what evidence to put in, and he should give it due consideration, as it was a matter of importance.

*Mr. Larocque* then asked leave to introduce further evidence, which was granted.

Witnesses were then called on both sides as to the facts of the service of the process by the marshal of the Southern District. Their testimony is sufficiently detailed in the following opinion delivered by the court, in disposing of the petition.

**BENEDICT, J.** Controversies like the present cannot always be avoided in a port where three sheriffs of three different counties, and two marshals of two different districts, to say nothing of other officers, have concurrent jurisdiction to make seizures on its waters.

Of this class was the late case of the ship *Ferdinand*, cited on the hearing, where all the three sheriffs claimed to have the simultaneous custody of the vessel ; and somewhat similar was the older case of the *Alida*, before Judge Betts, where the controversy was between the marshal, a sheriff, and a receiver.

This case differs, however, from most others in this important feature, that the rights and priorities of the various parties proceeding in admiralty, as between themselves, will not be affected by a determination of the question of the priority of seizure. This is because the



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character of the demands determines the order of payment, in whichever court the vessel may be sold and the proceeds distributed.

The application now made, therefore, does not look to a determination of any question of priority in payment, but rather seeks a determination of the question which of the two courts has legal custody of the vessel, and can make a valid decree of sale.

This question I much preferred to have raised and decided in the Southern District, where the first libel was filed, but as more than ample time and opportunity has been given for its examination there, and as it is now distinctly raised here by the marshal of that district, I do not hesitate to examine and dispose of it.

As to the general principle of law which is applicable to this case, no question can arise; for it is settled that so long as one court of competent jurisdiction has custody of property, no other court of concurrent jurisdiction can acquire jurisdiction thereof; and this custody of the law having been once fixed by the valid levy of an officer duly authorized to seize, continues, whether the officer be constantly present or not, unless acts equivalent to a withdrawal and surrender are shown. (2 *Parsons' M. L.* p. 523; *The Julia Ann, Sprague*, 388.) As to the controlling facts of the case there can be no reasonable doubt, and they are such as to render it unnecessary to consider whether the evidence offered with a view of showing a withdrawal by the marshal of the Southern District, and an acquiescence in the custody of the marshal of the Eastern District, does or does not establish that fact. The undisputed facts are such as to render it only necessary to consider whether the marshal of the Southern District ever made any valid levy on this steamer prior to the 27th of September, the day when the process from this court was served.

Prior to the 27th of September, the marshal of the Southern District had but one process in his hands, that

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in the suit of Bischoffsheim. This process Bates was deputed to serve, and what he did is proved by Bates himself, and by him alone. He says that he received the process on the 25th, and on the same day, by virtue thereof, seized a wooden side-wheel steamer, with two smoke stacks, which he supposed to be the "Circassian," which, when he seized her, lay in Brooklyn, south of the Hamilton Ferry, opposite the Atlantic Stores. This vessel, he says, went subsequently into the Atlantic Basin, where he was several times on board of her, and she then went away, but where to he does not know.

Now the Circassian is an iron vessel, a propeller, with one smoke stack. She was at no time south of the Hamilton Ferry or in the Atlantic Basin. On the 25th, and when seized by the marshal of the Eastern District on the 27th, she was between the Hamilton and Wall Street ferries, and has there since remained. Bates resided near the Hamilton Ferry, and is well acquainted with the locality of which he speaks, and is positive as to where he found the vessel which he seized, and that he was on her in the Atlantic Basin. He had no other process against any steamer, and if his evidence be true, he went to the wrong vessel, and made no levy at all on the Circassian prior to the 27th of September.

Moreover, Bates could not read writing, or write, and says that he received no instructions from the marshal, or any other person as to the wharf at which the Circassian lay, but went on his own knowledge, having seen her come in a day or two before, as he supposed.

The probability is that he mistook for the Circassian another steamer belonging to the same company, which it is proved did at this time lie at the Atlantic Stores, and subsequently went into the basin. It is quite clear he did not visit the Circassian, for of several persons present in court at this hearing, who were on board of her on the 25th, he can identify but one, and that one declares that he saw no such man as Bates at the vessel; while the

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quartermaster who was at the gangway the whole of the 25th, swears that Bates was not there on that day, nor was any seizure made on that day.

To this evidence is added the circumstance that when on the 2d of October, the marshal received a second process against the *Circassian*, he did not depute Bates to serve it, according to the usual practice, but gave it to another deputy, and in his special return he states his first seizure of the *Circassian* to have been made on the 2d of October.

It would seem to be difficult upon such evidence to hold that the marshal of the Southern District made any seizure of this vessel prior to the 27th of September.

But supposing the *Circassian* to have been the vessel which Bates visited on the 25th, there are still other features of this case which are decisive of the present application.

It is conceded that on the 25th of September, the sheriff of New York was on board the *Circassian* claiming to have her in custody. The marshal of the Southern District must therefore have done one of two things, either he ignored the custody of the sheriff and took the vessel into his own custody and control, or he acknowledged the custody of the sheriff and made no seizure himself.

He could not acknowledge the special property of the sheriff and at the same time take the possession and control himself.

That he acknowledged the possession of the sheriff, and took no possession himself is apparent from the returns which he made to the original and alias process in the case of *Bischoffsheim*.

The apparent inconsistency in the phraseology of this return is doubtless owing to the use of the ordinary blank return printed on the process, in which the marshal filled the date of the supposed visit of Bates to the vessel, and to which he added in writing the statement that the vessel was found to be in the custody of the

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sheriff. This written portion of the return is the controlling portion, and it announces and was intended to announce that the vessel was already in the custody of the law, and that therefore the marshal could not bring her before the court for condemnation.

Taken together, the return cannot, as I view it, be held to return any such seizure of this vessel as would render the marshal responsible, or would give the court jurisdiction. The fact stated in it showed a seizure to be impossible, and the statement was useless and immaterial except as an excuse for his failure to levy.

That such is the true construction of this return is shown by the testimony of the marshal's chief clerk, Mr. Thompson, who swears that the return made in this case is the return made in all cases where the sheriff is found in custody, and I am not aware that the returns made in this form have ever been understood to import anything more than that the marshal had on a certain day presented himself at the vessel for the purpose of seizure and had been unable to make it because of the prior custody of the sheriff. Such seems to have been the construction put on the return in this case, for on its being made, an alias process was moved for and issued. Why an alias if the vessel was already in court? Why if the marshal levied on the 25th of September, did he return upon the alias that on the 20th of November the sheriff was in custody? Why in his special return say that the sheriff was in custody on the 2d of October? Why, if this return showed the vessel in court, was a motion made to compel the marshal to strike out the reference to the sheriff's custody? Why, if that portion was not material, does the marshal decline to strike it out? Why, if on such a return the court can entertain jurisdiction do the processes still lie over without action thereon, and the suits, although involving a large amount and pending five months without any defence being interposed, remain stagnant, without entry of default,

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time to answer, or other steps looking towards a final determination? I can conceive of but one answer, and that an obvious one. The return of the marshal showed that the court had not acquired jurisdiction of the vessel against which the suits were brought. Both the return and suspension of proceedings were in accordance with the opinion of the court in the case of the *Robert Fulton* (1 *Paine*, 623), where it was said: "If the marshal found the vessel held by the sheriff under his attachment, he should have so returned upon his process, and all further proceedings of the court would have been arrested." These considerations are, in my opinion, sufficient to remove all doubt as to the jurisdiction.

But if doubt does exist as to the jurisdiction of this court, it certainly would be neither useful nor just to the libellants here, to prevent the proposed sale, which, if the court lacks jurisdiction can injure no one, and which the libellants are urgent should be made, and of the validity of which they are willing to take the risk; thereby compelling them to resort to a tribunal where the action and return of the marshal have rendered it impossible to proceed beyond the filing of the libel. Nor is it seen that any advantage could be derived from such an order by any of the parties who have filed their libels in the Southern District, but rather the contrary, inasmuch as proper proceedings on their part will enable them at once to obtain payment in this court out of the proceeds of the proposed sale, in the order of the priority to which they may be entitled, unembarrassed by the marshal's return in their present proceedings, which renders them ineffective.

A further feature of this case should be alluded to in order to explain the difference between the return of the marshal of the Eastern District and that of the marshal of the Southern District, and to prevent any inference that the propriety of either Marshal Murray's or Marshal Dallon's action as regards the sheriff is here called in question.

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The custody of the sheriff of New York, announced by Marshal Murray as existing on the 25th of September and subsequently, was a custody, as it now appears, under two warrants issued by a judge of the Supreme Court of New York, in statutory proceedings against this vessel under the State lien law. One of these proceedings has been since held void for want of jurisdiction by the Supreme Court, and the other is claimed to be equally invalid, and all such proceedings in a State court are brought in question by the late decision of the Supreme Court in the case of the *Moses Taylor*.

These warrants were however valid on their face, and the marshal of the Southern District deemed it his duty to acknowledge the custody of the officer who held them.

The marshal of the Eastern District, on the other hand, saw fit to treat them as void, and insufficient to authorize any levy by the sheriff, or prevent a seizure by him, and he therefore took possession and assumed and has maintained control of the vessel.

Whether the warrants held by the sheriff were void, and whether the marshal of the Eastern District could lawfully terminate any possession which the sheriff may have had on the 27th of September, are questions not raised or disposed of here, but are properly left by the parties interested in them to be raised in such possessory action, replevin suit, or other proceedings, as may be instituted to test the validity of any title based upon the action of the marshal of this district.

What it is intended to determine here is simply the question of priority between the two marshals, and the consequent jurisdiction over the vessel. On this question my conclusion is, that the marshal of the Southern District made no valid seizure of this vessel prior to the 27th of September, and that the sale of the vessel by the marshal of the Eastern District under the writs held by him

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should be allowed to proceed. The prayer of the petition must therefore be denied.

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The vessel was not, however, sold under these proceedings, the claims of the libellants being paid. The question which court had jurisdiction of the vessel being, however, thus disposed of, Bischoffsheim, before the discharge of the libellants' process, filed his libel anew in the District Court of the Eastern District.

Process against the vessel was issued on this libel, and the marshal made return that he had seized the vessel and given due notice to all parties to appear and defend. Upon the return of this process, besides other claimants, the sheriff of the city and county of New York appeared as a claimant and filed a claim, averring \* \* \* "that as sheriff he was in possession of the said steamship at the time of the alleged attachment thereof by the marshal of the Eastern District of New York, and prior to any attachment of or custody of said steamship by said marshal, and was lawfully entitled to such possession under divers attachments and process issued in due form of law to said sheriff out of the Supreme Court of the State of New York, and thereunder he has sold the said steamship, which attachment and process said sheriff is ready to produce, wherefore he prays to defend accordingly."

To this claim and appearance the libellant, Bischoffsheim, objected, and moved that the claim be stricken out.

For the motion, *Larocque & Barlow*.

In opposition, *Brown, Hall & Vanderpoel*, for the sheriff.

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BENEDICT, J. I do not conceive that this court has any power by any form of process to require an officer of a State court to submit himself, and with him the tribunal which he represents, to the jurisdiction of this court ; and I greatly doubt the power of the sheriff by making himself a party to proceedings *in rem* in this court, as here proposed, to bring proceedings pending in a State tribunal before this court for adjudication as to their validity. It is not seen how the decree of this court, adverse to the legality of the proceedings pending in the State tribunal, should such decree be made upon the issue sought to be raised by the sheriff, could be rendered effective to stay the action of the State court, and any determination which this court might make upon such issue, would seem, therefore, to be nugatory. If, on the other hand, the sheriff can submit himself to the jurisdiction of this court, it may be doubted whether, when he has appeared in an action *in rem*, and made himself a party by filing a claim to the vessel, he is in a position to insist that the vessel is not in the custody of the court. The appearance and claim may amount to an acknowledgment of a seizure by the marshal, and a seizure acknowledged by the sheriff would in such case doubtless give this court jurisdiction of the property.

What is desired by the sheriff is to bring to the notice of this court the fact that the marshal of this district has undertaken to seize a vessel which was in the custody of the sheriff, as minister of the law by virtue of proceedings pending in a tribunal of the State, in order that this court may stay its hand, and allow the proceedings in the State tribunal to go on without interference. In such an emergency two ways lie open to the sheriff. He may bring the facts before the court whose officer he is, and that court has doubtless full power to protect its own custody, if such it has ; or he may bring the facts before this court by petition, and pray this court to instruct its officer to withdraw from the vessel.



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And whenever the latter course shall be adopted, this court will always be found prompt to investigate the facts and solicitous to respect the action of the State officers, and will always avoid a conflict of authority when it is possible to do so consistently with law and justice.

This method of procedure, if followed in the cases of conflicting jurisdictions which must sometimes arise in a harbor like this, will in most instances result in a summary and final determination of the question of possession between the officers of the respective courts, and promptly relieve those officers as well as the courts themselves from many of the embarrassments which otherwise attend such controversies; or if cases arise where questions of such novelty and difficulty are found to be involved as to make a final disposition of them upon a summary petition inadvisable, it will be made apparent to both courts at the outset that a disputed jurisdiction is necessarily exercised, to prevent injustice, and not from any want of regard or respect for the action of another tribunal.

My opinion, therefore, is that the claim and appearance of the sheriff should be stricken out, and leave given him to apply by petition for the relief which he desires.\*

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\* The proceedings in the United States courts against this vessel resulted in the payment of the seamen, the settlement of one bottomry claim, and the bonding of the vessel in the *Bischoffaheim* case, in the Eastern District, by the mortgagee. That suit is still pending. A brief statement of what was subsequently done in the State court will be of interest.

While the above proceedings were pending, the decisions of the Supreme Court of the United States in the cases of the *Moses Taylor* (4 *Wallace*, 411) and the *Ad. Hines* (not yet reported) were made, and Judge Barnard, of the Supreme Court of New York, had in the case of the steamboat *Josephine* decided that under those decisions the State courts had no jurisdiction to enforce a lien on a sea-going vessel, and that the lien law of the State was so far unconstitutional. From this decision an appeal was taken to the General Term.

While this appeal was pending, a motion was made in the *Circassian* case, on

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## District of Connecticut.

MAY, 1867.

### W. A. WRIGHT ET AL v. THE NORWICH AND NEW YORK TRANSPORTATION COMPANY.

Where, in a collision between a steamer and a schooner, both vessels were sunk, and the steamer was afterwards raised and repaired, and this suit was brought by the owners of the schooner against the owners of the steamer, in which a decree was rendered for the libellants, with an order of reference to a commissioner to ascertain the damage, and his report, fixing such damage, was confirmed by the court,

And where the respondents, thereupon, applied to the court on motion to reserve

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behalf of Fiedler as assignee of Sturges, who had bought at the sheriff's sale, to set aside the sale and all the proceedings as void. On the other hand, a motion was made in behalf of parties who had warrants against her, to compel Sturges to complete his purchase and pay the purchase money. The motions were heard together before Judge Sutherland, and his decision, denying both motions, will be found reported in the 50th vol. of *Barbour's Reports*, p. 490.

The General Term of the Supreme Court reversed the decision in the case of the *Josephine*, holding the law constitutional. An appeal was taken to the Court of Appeals, which reversed the decision of the General Term and affirmed Judge Barnard's decision.

While this appeal was pending, Fiedler, who had acquired the title to the vessel by a sale under his mortgage and an assignment from Sturges, the purchaser, having paid off the decrees in the seamen's wages cases and bonded the vessel in the other cases in the United States courts, brought an action against the sheriff of New York to have the proceedings under the various warrants set aside and the twenty per cent. refunded, and to have the sheriff enjoined from further meddling with the vessel. He paid into court also a sum sufficient to cover the lien claims, which was by agreement to stand for the vessel, and she went to sea on the 10th day of August, 1867, having been in the custody of the law for nearly a year.

In this suit by Fiedler, the sheriff set up the lien proceedings by his answer; and after the decision of the Court of Appeals, his answer was stricken out by the Supreme Court and the money refunded to the mortgagee.

The various material men, who had relied upon the lien law of the State, lost every dollar of their claims, amounting to nearly \$20,000.

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the final decree, that they might take "appropriate proceedings" to apportion the sum for which they might be liable among the parties entitled thereto, under the provisions of the Act of Congress of March 8, 1851, offering to the court proof of the value of their vessel and her freight, and that such value was exceeded by the amount of the claims for property destroyed in the collision,

*Held*, that the liability of owners of vessels for damages done by their own to other craft in cases of collision, is limited by the third section of the act to the amount and value of their interest in the vessel at fault and her pending freight. That this limitation of liability is not confined to damages done to property on board the faulty vessel, but embraces all damages.

That the respondents are, under the circumstances of this case, entitled, by the fourth section of the act, to take proceedings to have the amount for which they are liable apportioned among the parties entitled to it.

But that this court has no power to give them such relief in any form of proceeding. That power does not belong to its jurisdiction in admiralty, certainly not in a suit *in personam*, where neither the faulty ship and freight, nor their amount or value, is within the control of the court, and where the court can render no judgment that will bind parties not before it, and cannot make parties of such as reside and remain out of the district. And the court has no equity powers adequate to granting such relief.

That the evidence must be rejected and the motion denied; and as the value of the steamer and her freight, at the time of the collision, was greater than the amount of the report, the libellants must have a decree for that amount.

SHIPMAN, J. On the 18th of April, 1866, the schooner *S. Van Vliet*, owned by the libellants, and the steamboat *City of Norwich*, owned by the respondents, collided in Long Island Sound. The collision sunk the schooner, and both she and her cargo were lost. The steamboat was greatly damaged by the blow, and soon after took fire and sunk. She had on board a valuable cargo, which was lost. The steamer was subsequently raised and repaired at great expense.

A libel *in personam* against the owners of the steamboat was filed in this court, and after answer and full hearing, she was held in fault, and a decree entered against her owners, with an order of reference to a commissioner to compute the damages to the owners, both of the schooner and her cargo, and report the same to the court. The commissioner heard the parties and made a special report. Upon motion that the court confirm the report, counsel were heard upon the questions of

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law raised pertaining to that branch of the case. The report was confirmed upon principles set forth in the opinion of the court, and the damages of the owners of the schooner were fixed at \$19,975, and those of the owners of the cargo at \$1,921.13.

Thus far the case presented only the ordinary features of a suit for collision, and was free from all embarrassing questions. If nothing further now appeared, the libellants would be entitled to a decree against the respondents for the full amount of the above damages.

At this point, however, the respondents move the court to reserve the final decree, that they may "take appropriate proceedings," and offer evidence to this court "for the purpose of apportioning the sum for which the owners of the steamboat may be liable, among the parties entitled thereto." The object of the respondents is to avail themselves of the benefits of the provisions of the Act of Congress of March 3, 1851, limiting the liability of ship owners for the consequences of the torts of the master and others on board. The respondents insist that they have laid the foundation for this proceeding in their answer, by averring that the damages resulting from this collision to third parties greatly exceed the value of their boat and her freight then pending. No formal steps have been taken by way of presenting evidence to this court of the amount of the claims of those whose property was on board of the faulty boat, and was injured or destroyed by her taking fire and sinking, but, upon suggestion of the court, and by consent of counsel, such evidence was considered as offered under this motion and objected to, and the general question of the right of the respondents to relief, and the power of the court to grant it, was argued at length.

The points discussed at bar may be condensed into the following questions :

1. How far the original liability of ship owners for the faults of their vessels in cases of collision is limited by the Act of March, 1851 ?

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2. What relief the respondents are entitled to under that act?

3. How far this court can grant such relief as the act intended to provide?

I see no reason to doubt that the liability of owners of vessels for damages done by their own to other craft in cases of collision, is limited by this act to the amount and value of their interest in the vessel at fault, and her pending freight.

The third section of the act is too explicit to be explained away by any comparison of its provisions with the history of British legislation on the same general subject. The direct language of this section coincides with the plain and well known object of the whole statute, which was to encourage commercial enterprises in the building and sailing of ships, by relieving the owners from any liability for losses beyond the value of their interest in the vessel and freight pending. The argument of the libellants' counsel is that the liability limited by the act, so far as it relates to collision, is confined to damages done to property on board the faulty vessel—in other words, that the sole object of Congress, was to relieve the owners whose vessel may be in fault, from the unlimited liability to which they would otherwise be held as common carriers. The attempt is made to support this construction by arguments drawn from the history of the various English acts on this subject, and by a comparison of the language of those acts with that of our own. But, as already intimated, I regard this section as too explicit to admit of any such construction. It would not be plainer if the other words were left out, and it read simply "the liability of the owner or owners of any ship or vessel \* \* \* for any loss, damage, or injury by collision \* \* \* without the privity of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel and her freight then pending."

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The reasons for limiting the liability for injuries resulting to other vessels and their cargoes are just as weighty as those for limiting it for injuries done to the cargoes of the vessels in fault. Collisions are frequent, their hazards great, and the injuries inflicted upon other vessels and cargoes often far exceed the value of the faulty ship and her pending freight. The disaster out of which this controversy has sprung, presents an instructive lesson on this point. Had the libellants' vessel been condemned as in the wrong, her owners, according to their present argument, would have been liable for the whole amount of damages done to the City of Norwich and her cargo, exceeding by many times over the amount or value of their interest in the Van Vliet. The owners of the latter would not only have lost their vessel and her pending freight, amounting to over \$20,000, but would have been responsible to other parties for probably \$100,000 more. It was against just such calamities, out of all proportion to the magnitude of the capital invested, that I understand this act to provide. I apprehend that this construction of the third section of this act would never have been doubted, but for the singular provisions of the fourth section. But I do not think they seriously affect the question.

This brings us to the consideration of our second point—what relief the respondents are entitled to under this act. They have alleged in their answer, and now offer to prove, that the injuries resulting from this collision, including not only those which these libellants are seeking indemnity for, but also those suffered by owners of property on board the City of Norwich, greatly exceeded in amount or value their interest in the latter boat and her freight then pending. They propose to prove her value, and the value of her freight, and the extent of the losses to the owners of the property on board, in order to enable the court to apportion the sum for which the owners of the boat are liable, among the

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parties entitled thereto, to wit: these libellants and the owners of goods destroyed on the respondents' boat. This, they claim, they are authorized to do by the fourth section of the act in question, which is as follows :

" If any such embezzlement, loss, or destruction shall be suffered by several freighters or owners of goods, wares, or merchandise, or any property whatever, on the same voyage, and the whole value of the vessel and her freight for the voyage shall not be sufficient to make compensation to each of them, they shall receive compensation from the owners of the ship or vessel in proportion to their respective losses ; and for that purpose, the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum, for which the owner or owners of the ship or vessel may be liable, among the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act on the part of such owner or owners, if he or they shall transfer his or their interests in such vessel or freight, for the benefit of such claimants, to a trustee to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be entitled thereto ; from and after which transfer all claims and proceedings against the owner or owners shall cease."

It was undoubtedly foreseen by Congress, that in cases of embezzlement and kindred torts, and in cases of collision, there would arise instances where several different parties would have claims for damages against the owners of a vessel, exceeding her value in the aggregate, and would very likely endeavor to enforce them in separate suits and in different tribunals, and in order to protect the interest of all parties, it was necessary that there should be some way provided by which the amount to which the liability of the owner is limited, should be distributed among those entitled to recover, in propor-

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tion to their respective claims. This state of things would exist, or at least might exist, whenever property on board either one or both colliding vessels, belonging to parties other than such owners, was destroyed or injured, and the whole amount of damage should exceed the value of the faulty vessel and her pending freight. Indeed, it might occur where one vessel strikes two others in the same collision, as has more than once happened, and the owners of each injured vessel should bring a separate suit. The language of this fourth section is, therefore, very broad, and extends the power of taking proceedings for an apportionment to the owner of the faulty vessel, and to the several owners or freighters of any property whatever lost or destroyed by the tortious act of those on board. Whenever, therefore, there are several claimants for damages arising out of the same tortious act, who have brought, or may be entitled to bring, separate suits, the necessity for apportioning the amount, for which the owners of the vessel in fault are liable, arises. The respondents in the present suit find themselves in that condition. In addition to the claims of these libellants, upon which large damages have been awarded against them, they are liable, assuming the judgment of this court as to the cause of the collision to be correct, to freighters or owners of goods on the City of Norwich for a much larger amount; and they aver that the whole sum for which they are thus liable exceeds the value of their interest in their boat and pending freight at the moment preceding the collision. They are entitled therefore to take proceedings to have the amount, for which they are liable, apportioned among the parties entitled thereto. This is one species of relief which the act intended to provide. The other, the transfer of the ship and freight to a trustee, they have not resorted to, and therefore nothing need be said on that subject.

Just here we enter upon the most embarrassing ques-



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tions which arise under this act. The power given to parties, to protect their rights by an apportionment of the sum for which the owners of the vessel are liable, is expressed in vague and uncertain terms, both as to the nature of the proceedings to be taken, and the court which is to administer them. We are, therefore, brought to the consideration of our last question, how far this court can grant the relief which this act intended to provide. The language of the act is, that the parties authorized, or any one of them, "may take the appropriate proceedings in any court for the purpose of apportioning the sum," &c. What is here meant by "appropriate proceedings?" It is reasonable to suppose that Congress, by this language, referred to some course of legal procedure already known to the law, and administered by some distinct tribunal, according to a settled practice. As this act was framed with full knowledge of the various English acts, relating to the same subject, and was intended to accomplish substantially the same result, we may infer that the appropriate proceedings contemplated were substantially such as have been employed in the enforcement of the English act. These were equity proceedings, administered by the High Court of Chancery. That tribunal was empowered to entertain suits of this character, and to draw the whole controversy within its jurisdiction, by stopping actions in all other courts relating to the same subject matter. The most ample powers were conferred on that court to enable it to make a complete, effectual, and final disposition of the litigation, so as to bind all parties in interest. These powers were transferred to the High Court of Admiralty in 1861. (See Judge Benedict's opinion in the case of *The Steamboat City of Norwich* ads. *Place*.) Some such powers as those exercised by the English courts must be possessed and employed by whatever tribunal effectually

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\* See *ante*, p. 89.

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administers this act of Congress. It must be able, by a binding decree, to settle the whole controversy, and conclude the parties in interest. Now our present inquiry is, whether this court possesses powers commensurate with such a task. Waiving now the question whether, if it had the power at all, it could proceed to exercise it in connection with, and as a part of, the present suit, I pass to the inquiry whether it can do so under any form of proceeding, unless its jurisdiction is first enlarged. It is true that this section says that the parties, or any of them, "may take the appropriate proceedings, in any court for the purpose of apportioning, &c." Of course these words, "any court," are not to be taken in their literal sense. From necessity we must restrict and qualify them at the start. A court whose jurisdiction is exclusively criminal, cannot be deemed within their meaning. No one will doubt that civil as distinguished from criminal tribunals, alone were indicated. Nor can we suppose for a moment that it was intended by this act to authorize a resort to all civil courts. Tribunals of limited and inferior jurisdiction, like probate, surrogate, or local city courts, are not within the meaning of these words, although within their literal expression. They undoubtedly refer, as the latter clause of this section, when providing for the transfer of the vessel to a trustee, designates, to courts of competent jurisdiction,—tribunals having a range of authority and a mode of procedure adequate, or at least adapted to accomplish the purposes the act had in view. Now, the only courts of a character at all resembling this description, are courts possessing a general equity jurisdiction. Whether even such courts, as constituted in this country, are, without the aid of special legislation, adequate to this task, I do not now stop to inquire. Nor do I pause to ask the question whether the equitable jurisdiction of any other court of the United States, as the law now stands, is equal to the work. It is sufficient for me here,

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to determine whether this court has any such power. I answer unhesitatingly, that it has not. It does not pertain to its jurisdiction in admiralty; certainly not in a suit *in personam*, where neither the faulty ship and freight, nor their amount or value, are within the control of the court. In a suit *in personam*, it can render no judgment that would bind parties not before it. None of these freighters are parties to this suit, and it is doubtful if this court has power to make them parties. Certainly, it has no power to make parties of such as reside and remain beyond the limits of this district.

It is hardly necessary to add that this court has no equity powers adequate to the exercise of the duty supposed to be conferred upon some court by this section of the act. Its jurisdiction depends upon the acts of Congress, and with the exception of a single subject matter, no equity jurisdiction has ever been conferred upon it. I presume it will hardly be contended that, because Congress has authorized, in terms, appropriate proceedings to be taken in any court, it has, by implication, conferred upon every court powers adequate to the work of effectually administering this act. And if it has not, this court is without jurisdiction, without rules of practice, and without the power to make such rules, adapted to accomplish the object of the statute, and give effectual relief to the parties interested in the sum for which these respondents are liable as damages for this collision.

The conclusion is, that the court has no power to grant the relief asked for on this motion, or under any form of proceeding that could be instituted. The evidence offered is therefore rejected, and the motion denied. And as it is conceded that the value of the City of Norwich and her pending freight, at the time of the collision, was much greater than the damages assessed in this case, a decree must be entered for the libellants for the sum fixed by the court on confirming the commissioner's report.

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The Brig Anastasia.

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## Eastern District of New York.

MAY, 1867.

## THE BRIG ANASTASIA.

SALVAGE.—SUPERSEDING MASTER.—TAMPERING WITH EVIDENCE.—  
COSTS.

Where the libellant went on board the brig at Bermuda to come in her to New York, and alleged that the master proved incompetent, and after being out twenty-three days, the provisions and water falling short, he took charge of the vessel and brought her into a port of Nova Scotia, contrary to the wishes of her master, and thereby saved her to her owners,

*Held*, That the facts alleged by the libellant as to the condition of the vessel were not sustained by the proof.

That whether the libellant did supersede the master or not, the facts of the case were not such as to warrant the court in giving him compensation for such action.

No such extraordinary remedy was necessary under the circumstances shown. That the libellant's claim, therefore, must be dismissed.

Where the log of the vessel, as produced in court, had plainly been tampered with by the master or mate, or both—the master being part owner, and the mate his brother,

*Held*, That such a circumstance might well justify a court in rejecting, without ceremony, not only the log, but also the evidence of the persons who attempted to impose it upon the court.

That the court would mark its disapproval of such misconduct by condemning the vessel to pay the costs of the action.

This was an action to recover salvage.

The libel was filed by Walter Burke in behalf of himself and all others, and it averred that in December last the libellant, Burke, being in Bermuda, and desirous of coming to New York, was offered a passage, free of expense, in the Italian brig "Anastasia," and he accordingly came on board for that purpose, and that there

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The Brig *Anastasia*.

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came on board at the same port a crew of six consul's men also bound to New York ;

That in the prosecution of the voyage the vessel met with adverse winds and cold weather, which the Italian master and crew proved incompetent to contend with successfully ; that the vessel was frequently and unnecessarily put back, and so kept knocking about for some twenty-three days without making any port, when the whole voyage need not have occupied more than ten or fifteen days at the farthest ;

That on the twenty-third day of the voyage, when the provisions and water were already getting short, and when the vessel was within about thirty miles from the port of Liverpool, Nova Scotia, the wind then blowing from the northwest and the brig being badly iced, the master announced his intent to put back again and run for Bermuda ; that such course, if adopted, would have placed the vessel in great danger of loss through the starvation of all on board ; whereupon, the libellant, Burke, in order to preserve the vessel, took charge of the same, and with the aid of the consul's men knocked off the ice and headed her for Liverpool, contrary to the wishes of the master ; that she arrived off Liverpool the same night at dark, and stood off and on till morning, when she went into the harbor in safety ; and but for the services so rendered by him, the libellant alleged that the vessel would, as he believed, have been totally lost, and that such services were extraordinary and entitled him to a salvage compensation.

These allegations the claimants for the most part denied, and they insisted that the vessel was in no danger ; that her master and crew were competent to her navigation ; that the libellant rendered no service ; and that the vessel went into Liverpool in accordance with the wishes of her master, in order that they might get rid of the libellant and the consul's men, who, as it is

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The Brig *Anastasia*.

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claimed, seemed desirous of causing disturbance on the vessel.

For libellant, *Benedict, Tracy & Benedict*.

For claimants, *Beebe, Dean & Donohue*, and *T. Scudder*.

BENEDICT, J. This case has been treated on both sides as if the crew of consul's men were to be considered libellants as well as Burke, although the libel sets forth that no special services were rendered by the crew—makes no claim for compensation to them, and prays no decree in their favor. I shall therefore consider the case as it has been treated by the advocates, and shall in the first instance dispose of the claim of the seamen by saying that the proof that they were paid in Liverpool for their services on board, a sum which they received in full of all their demands, is clear. They were intelligent men, and knew what they were about when they accepted this payment as in full, and I must hold any claim they may have had, to have been satisfied by this payment.

There remains the demand of Burke. The position of this person on board the brig, as described by himself, is somewhat anomalous, and I do not consider it clear that he can be considered to have been a passenger within the meaning of the maritime law as applied to passengers in cases of salvage.

In the case of the *Hanna* (*Law Times R. N. S.* vol. 15, p. 334), it was held by Dr. Lushington that a person very similarly situated was not a passenger nor a seaman, but a nondescript.

This question, however, is immaterial in this case, as I am of the opinion that it is not in any aspect a case where a salvage can be awarded to him. It will be observed that the libellant does not claim to have performed any considerable labor or incurred any personal risk or displayed any extraordinary ability, but his de-

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The Brig Anastasia.

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mand is based upon the fact, as he claims it to have been, that he assumed the extraordinary responsibility of overruling the actual master of the vessel and of putting himself at the head of the consul's men and carrying the vessel into Liverpool without the direction and contrary to the wishes of her master. That the libellant did this is stoutly denied by the Italian master and crew; but if he did, I cannot, under the facts of this case, endorse his action to such an extent as to award him a salvage compensation therefor.

This vessel had suffered no injury from stress of weather. The allegation that she was short of provisions or water is not sustained by the proofs. Her master and crew were in good health, sufficient in number for the ordinary crew of such a vessel; and, although their method of navigation would doubtless be far from satisfactory to most American seamen, they were competent, after their fashion and in their own time, to complete their voyage. It is, therefore, not a case where the extraordinary remedy which the libellant claims to have resorted to was necessary for the salvation of the vessel. It must be a strong case, clearly proved, which would justify a court in commending, by a salvage award, the assumption of such authority and such a responsibility.

The interests of commerce, which are the foundation of the whole doctrine of salvage, require that the master of a ship, who has been intrusted by the owners to take charge of their property, and who is responsible to them for its safe return, shall continue in command, as long as there is any vessel left to be commanded. He may call salvors to his aid, but he is to be superseded while at sea only as a last resort in a case of desperate necessity. I do not say that the case may not arise where it might be the duty of a passenger, seaman, or any other competent person present, to overrule the master and change the destination of a vessel against his wishes, nor do I say that the due assumption of such a responsibility would

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The Brig Anastasia.

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not be good ground for awarding a salvage compensation. But I apprehend that a case far stronger than the present one must be made out to justify such an award, whether to a person who did or did not owe duty to the ship.

I shall therefore reject the libellant's claim to recover a salvage award, but in so doing cannot allow to pass unnoticed a feature in the defence which I regret much to have seen. I allude to the condition of the brig's log book as produced in court by the claimant. It is clearly to be seen that this log has been tampered with by the master (who is part owner of the brig) or the mate (who is his brother), or both—parts erased—parts written in since the occurrence of the transactions purporting to be related. Such a circumstance might well justify a court in rejecting without ceremony, not only the log itself, but also the evidence of the persons who attempt to impose it upon the court, and in a different case from the present might have ensured defeat to the claimants.

In the absence of any other way of marking my disapproval of such misconduct, I shall render in this case a decree similar to one rendered by Dr. Lushington for a different reason in the salvage case of the *Roselen* (*M. L. C.* vol. 2, p. 220), and while I award no sum to the libellant as salvage, shall condemn the vessel to pay the costs of this action.



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The Steamboat Cayuga.

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MAY, 1867.

## THE STEAMBOAT CAYUGA.

## COLLISION IN HUDSON RIVER.—FERRY BOAT AND STEAMBOAT.—VESSELS CROSSING.

Where a steamboat was coming down the Hudson River, and approached the track of a ferry boat which was crossing from Hoboken to New York, and stopped her engine, but started it up again when the ferry boat was directly ahead of and close to her, and struck the ferry boat on her port quarter, and the pilot of the steamboat testified that he made no attempt to swing his bow to starboard, although a swing of ten or fifteen feet would have carried him clear, and excused his doing nothing by saying he had not time to do anything, while other witnesses testified that he did shift his wheel and was swinging to west at the time of the blow,

*Held*, That the ferry boat, upon seeing the steamboat stop her engine, was entitled to consider that she intended to allow the ferry boat to pass her bows, and to act accordingly.

That the ferry boat was therefore free from fault in keeping on.

That the starting of the steamboat's engine again in such circumstances, was a fault on her part.

That if the pilot's excuse for not sheering be held good, it shows the vessels in such close proximity as to make clearly manifest the impropriety of his starting the engine. If it is not held good, then he was in fault in not attempting to sheer; and if, as stated by other witnesses, he did sheer, his statement, on which the claimant chiefly relies, is discredited.

The facts of this case appear in the opinion of the court.

For libellants, *W. A. Fuller*.

For claimant, *C. Van Santvoord*.

BENEDICT, J. This is a case of collision. The libellants are the owners of the Hoboken ferry boat, James Watt, and proceed against the Hudson River towboat

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The Steamboat Cayuga.

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Cayuga, to recover for injuries received by the ferry boat on the 13th of June, 1866.

The place of the collision was near the middle of the Hudson River, about opposite Robinson street. The tide was ebb. The weather was clear, and the time was about four o'clock in the afternoon. The course of the Cayuga had been from her berth at the foot of Desbrosses street on the New York side down to Hubert street, when she rounded up the river, expecting to pick up a boat there, but the boat being unable to get out, the Cayuga again rounded out and down the river on her way to the Battery, to make up her tow. Shortly after heading down, she came in contact with the ferry boat, which was proceeding upon one of her regular trips from Hoboken to New York, striking the larboard quarter of the ferry boat some ten or fifteen feet from the stern.

The claim on the part of the Cayuga is, that when she rounded out and down from Hubert street, the ferry boat was further up the river and going at a greater speed than the Cayuga; that the ferry boat came down upon the Cayuga's starboard quarter, and then straightened down upon a course parallel with that of the Cayuga, and about two lengths outside of her; that this course was held by the ferry boat until her stern was even with the Cayuga's bow, when she sheered sharp to east across the course of the latter, and so close that there was not time for the Cayuga to reverse her engine or swing to west, and consequently the vessels came in contact.

On the part of the ferry boat it is claimed that the two vessels were approaching upon converging lines, the ferry boat crossing from Hoboken and the Cayuga heading for the Jersey side just below Jersey City; that the ferry boat was at the outset farther down the river than the Cayuga, but that the latter was going the faster of the two; that the ferry boat held a straight course, headed for about the foot of Liberty street, and as she was outside of and upon the starboard hand of the Cay-

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The Steamboat Cayuga.

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uga, it was the duty of the latter to avoid her; that the Cayuga accordingly did stop her engine when the boats were at such a distance apart as would have enabled the ferry boat to pass, but started it again before the ferry boat was out of the way, and so ran into her.

The voluminous, and in many aspects contradictory, testimony introduced in support of these respective theories has been examined with care, but as I view the case it is necessary to consider only a single feature of it.

I consider it to have been satisfactorily shown that after the Cayuga had rounded out and down the river from Hubert street, and when the ferry boat was in plain sight crossing the river upon a regular and known trip from Hoboken to New York, the engine of the Cayuga was stopped and again started when the ferry boat was directly ahead of and close to her.

Now, whether the courses and speed of the two vessels up to this point had been as contended for by the libellant or the claimant, the ferry boat being, as she was, a ferry boat and in plain sight, upon seeing the Cayuga stop her engine, became entitled to consider that the Cayuga intended to allow her to pass upon her trip, and to act accordingly. There was therefore no fault on the part of the ferry boat in keeping on and passing the bows of the Cayuga. Such a course was to have been expected when the Cayuga stopped, and it would have entailed no danger of a collision had not the Cayuga started her engine again before the ferry boat had fairly passed. This starting up of the Cayuga when she did, brought the two into close proximity, and it was manifest when the Cayuga thus started up, that at the best she must shave the ferry boat very closely. The two vessels were by this movement brought into dangerous proximity, and the boat attempting the manœuvre must be held responsible for the failure to successfully accomplish it. Furthermore, the statement of the pilot of the Cayuga is, that he made no effort at all to swing

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The Steamer City of Paris.

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his bow to west when the danger of collision became imminent, although the ferry boat was moving past his bow, and although a swing of ten or fifteen feet would have carried him clear. The excuse of the pilot for this inaction is, that it would have required two full turns of the wheel to swing the bow of the Cayuga ten feet, and that there was not time to make these turns. If such be the fact with regard to this boat, it makes clearly manifest the impropriety of starting her engine when within such a short distance of a vessel ahead. If such be not the fact, it was an additional fault in the pilot not to attempt to shift his wheel, while if, as is stated by some of the witnesses, he did shift his wheel, and was swinging to west at the blow, the positive denial of the fact by the pilot casts doubt upon the claimant's theory of the case, resting so largely as it does upon his testimony.

My conclusion therefore is that the collision in question was caused by the fault of the Cayuga, and that the libellants are entitled to recover of her the amount of their loss.

Let a decree be entered accordingly, with an order of reference to ascertain the amount.

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MAY, 1867.

## THE STEAMER CITY OF PARIS.

COLLISION IN NEW YORK HARBOR.—STEAMER AND SCHOONER.—  
LOOKOUT.—CHANGE OF COURSE IN EXTREMIS.

Where a steamer going to sea through a crowded harbor, chose a passage between two vessels at anchor, and seeing a schooner crossing the passage, at once star-boarded her helm to go under the schooner's stern if possible, and slowed and stopped her engine, and the schooner, which had not kept a good lookout, on seeing the steamer as she passed by the vessel which was anchored off the steam-

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The Steamer City of Paris.

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er's port bow, luffed a little, and then kept off immediately, and the steamer struck the schooner near her foremast and sunk her,

*Held*, That the steamer had no right of way out to sea through the passage in question.

That, though the steamer did all she could after undertaking the passage, she was in fault for not stopping sooner. Having kept on and placed herself in a position involving danger of collision, and well calculated to excite alarm, she must be held responsible for the consequences.

That the schooner's luff did not appear to have prevented her from passing the steamer's track, but if it did, being a movement made *in extremis*, and under the alarm caused by the near approach of the steamer, it was no ground for holding her chargeable.

That if the court could see that the careless watch on the schooner had contributed to the collision, she would have been held in fault; but with a good lookout she would have been bound to hold the course she did till the luff, and the luff, if it was a false manœuvre, was not caused by the want of a lookout, but by the dangerous attitude of the steamer.

This action was brought to recover the sum of \$7,200, being the alleged value of the schooner Percy Heilner, which vessel, while proceeding across the North River to Jersey City, was sunk by a collision with the steamer City of Paris, at the time proceeding down the river bound to sea.

The place of the collision was below the Battery, and to the east of Ellis' Island,— the time, about nine o'clock in the morning,— the tide, ebb,— the weather clear, and the wind blowing freshly from the E. N. E.

The river below the Battery was quite full of vessels, riding athwart the river, tailing to the west, so that the passage of vessels down the river was much obstructed. Just to port of the direction of the Narrows, and east of Ellis' Island, there was an opening between the stern of the brig Hermania and one or two vessels lying to west of and a little below her. This opening formed a passage, which, although of sufficient width to permit the steamer to pass through, was too narrow to allow her to change her direction more than a point or two, when once her course was laid for it; and, as the wind and tide were, when once in the passage, she could not

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The Steamer City of Paris.

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stop, without danger of being driven upon the vessels to the west and below.

The schooner was sailing before the wind, upon a course which would carry her across this passage, passing from east to west, a short distance below the brig, and her rate of speed was such as to bring her to the passage at about the same time with the steamer.

Some doubt appears to have existed in the minds of those in charge of the steamer as to where they should pass through the fleet of vessels which lay before them, and after consultation the opening described to the west of the brig was selected.

When the schooner was first seen by those in charge of the steamer, the steamer was heading for the middle of the passage in question, and the schooner was in range of the brig off the steamer's port bow. As soon as the schooner was seen, the wheel of the steamer was put hard-a-starboard, and the engine slowed. When she had swung a point and a half to the east, and as far as it was safe to swing, for fear of the brig, her course was steadied, and the engines stopped, but her headway continuing, she passed the brig and came in contact with the starboard side of the schooner. Being then in danger of getting on the vessels to the west, she started her engine again, and pushed through the passage with the schooner hanging to her bow, and when through, backed off from the schooner which at once sank.

*Owen, Gray & Owen*, for the libellants, argued, (1.) That the steamer was in fault upon the facts, (a) in that she was running at too high a rate of speed for a crowded harbor, (b) in that she was not slowed down before coming up to the narrow passage between the vessels, (c) in that she did not have a proper lookout, and (d) in that she was not stopped soon enough.

2. That it was the statutory duty of the steamer to "keep out of the way" of the schooner, and not having

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The Steamer City of Paris.

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done so, she is responsible for the consequences of the collision, unless she has succeeded in showing that she was prevented from so doing by the schooner not keeping her course. (13 *U. S. Stat.* p. 60; *The Steamer Fairbanks*, *Judge Betts*; 13 *Eng. Adm. R.*)

3. That the claimants had failed to show that the schooner did not keep her course, as the law required her to do, but that the weight of the testimony was that she did keep her course.

4. That if the schooner did luff, and then immediately kept off, as claimed by the steamer, still that furnished no excuse for the steamer. Even in such case she might and could have, with due and proper precautions, avoided the schooner.

(a.) Such luffing and then keeping off did not embarrass the movements of the steamer. Her wheel had been put to starboard, and there it was kept, as was testified, until the collision. There was no changing of the wheel in consequence of such alleged luffing.

All that was done by the steamer after the luffing was to stop and back. This was what ought to have been done before coming into such dangerous proximity.

(b.) But the weight of testimony shows that by the alleged luffing the schooner did not materially change her course or lose time.

5. That even if the schooner had committed an error by luffing as alleged, still she was not responsible for any of the consequences that accrued therefrom.

She did not voluntarily bring herself into the danger in which she found herself. She had not previously committed any fault in her navigation, but she was brought into such danger by the improper navigation of the steamer, in coming down at great speed, and in attempting to pass through the narrow opening between the bow and the stern of the vessels at anchor.

This comes clearly within the rule upon this subject. (*The Genesee Chief*, 12 *How. R.* 450; *The Pacific*, 21 *Id.*

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The Steamer City of Paris.

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372.) A change of course "*in extremis*" is not held to be a fault.

*T. C. T. Buckley* and *R. D. Benedict*, in behalf of the steamer, argued the following points :

1. In this, as in all other cases of collision, no presumption of liability arises from the fact of collision. (The "*John Frazier*," 21 *Howard*, 194; The Morning Light, 2 *Wallace*, 557.) Before the loss occasioned by a collision can be fastened on a party, it must be established by preponderating evidence that the loss has been occasioned by his culpable neglect. (The *Lego*, 2 *Hagg. Adm.* 356, 360.)

2. It is urged that the rules of navigation established by the Act of 1864 establish that in all cases of collision occurring between a sailing vessel and a steamer, proof of the mere fact of collision is sufficient, and the fifteenth article is invoked in support of the claim.

Such latitude of construction would not only be subversive of the purposes for which it is presumed the rules were adopted, but it is opposed to the language of the nineteenth and twentieth articles of the same code, which preserve in their full integrity all rules which have heretofore formed part of the general maritime code regulating the duty of sailing vessels and steamers approaching on opposite courses.

3. One of the most elementary of those rules requires that there should be a proper lookout. By that is clearly meant a person engaged in observing the movements of approaching vessels; and where such a duty is not discharged at all, or defectively discharged, to say the least, the burden is cast on the side where such fault is shown to exist, of clearly satisfying the court that absence of a lookout in no wise contributed to cause the collision. (The *Saxonia*.)

The schooner had an absolutely free wind, and was crossing a thoroughfare which was the legitimate track



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The Steamer City of Paris.

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of outward-bound steamers, and if the law imposes on such steamers the obligation to give way to her, the correlative obligation also exists that the schooner shall observe the movement, and do nothing to thwart or impede it.

4. Another rule of equal force has also been established by numerous decisions (*Parker v. The Steamship Scotia*; *Caldwell v. State of Maine*), to wit: that a sailing vessel approaching a steamer shall keep her course, and the steamer has the right to regulate her movements on the supposition that such a rule will be fully complied with.

The law in relation to collisions between steamers and sailing vessels is laid down very fully by Judge Betts, in the case of the "New Jersey." (*Olcott*, pp. 419 and 420.) It is just as good law now as it was before the adoption of the regulations for the prevention of collisions. They merely made statutory what was previously the law of the sea in such cases. And from the law, as laid down by Judge Betts, it is clear that the libellants cannot recover in this action in either of the three following cases:

(1.) If the schooner had no competent and careful lookout, unless she establishes that the want of it in no way contributed to the collision.

(2.) If she changed her course so as to throw herself across the steamer's track.

(3.) If she could have avoided the collision by any manœuvre, when she saw or could have seen that the steamer could not avoid her without it.

5. The schooner had no proper lookout, as was shown by the testimony.

6. She altered her course, and was in fault in so doing, and the case does not come within the rule of a change "*in extremis*," because if it was made in fright by those on the schooner, that fright was not caused by any movement on the steamer's part, but because she had

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not been seen as she should have been, owing to the negligence of the schooner's lookout.

7. After changing her course she should have kept on instead of shifting her helm again.

8. As to the faults charged against the steamer, it would have been very imprudent for the steamer to stop as she approached the passage, for she would have lost steerage way, and would have been carried down on the vessels at anchor.

But she had as good a right of way out to sea, as the schooner had across to Jersey City, and all that could be reasonably required of her was that she should pursue her course at a moderate rate of speed, and keep a sharp lookout; and both of these things she did.

9. The steamer has shown that she could not have avoided the collision; while the burden of proof is thrown upon the schooner in consequence of her want of a lookout, to establish that she could not avoid it, and this she has failed to do.

BENEDICT, J. It is manifest that this steamer, having run down a sailing vessel, in broad daylight, must be held responsible for the loss unless it appears that the accident was caused by some false manœuvre on the part of the sailing vessel.

Such a manœuvre is charged here, and it is insisted that the cause of the collision was a sudden luff made by the schooner after she had passed the range of the brig's stern, which threw her under the bows of the steamer.

The evidence shows, that some such movement did take place at the time indicated. What the movement was is best shown by the testimony of a pilot who was watching the two vessels from the deck of the brig, who says that when the schooner was abreast of the brig's stern "she came to, luffed a little, and then kept off immediately after she luffed."

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The Steamer City of Paris.

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It is not claimed that this movement on the part of the schooner had any effect to change the course, or speed, of the steamer; but it is insisted that it caused unnecessary and unexpected delay on the part of the schooner in crossing the passage; and several witnesses from the steamer express a confident opinion that the time thus lost was sufficient to have enabled the schooner to pass the steamer's bows in safety.

The schooner was, however, moving rapidly before the wind. She did not come to till abreast of the brig's stern, and filled away again instantly. The point of first contact was her foremast, and when struck, her position was some one hundred or one hundred and fifty yards to the west of the range of the brig's stern. The delay caused by the luff must therefore have been very slight, and to determine positively that it was the cause of the collision, would involve a nicer calculation than could be safely based upon the facts proved here.

But if the delay was the cause of the collision, it cannot be charged upon the schooner as a fault, for the luff was made *in extremis*, and was caused by the close proximity of a large steamer, made more dangerous from the fact, that owing to the position in which the steamer had placed herself, she could neither stop her way, nor sheer further to the east.

As I view this case, the collision was caused by the fault of the steamer in attempting to pass through a narrow passage across which she saw, or ought to have seen, that a sailing vessel must pass at the same time.

It is indeed true, as claimed on behalf of the steamer, that she did all that she could after she had undertaken the passage; but she should have stopped sooner, and had she done so, no collision would have occurred. I do not assent to the claim set up here on behalf of the steamer, that "she had as good a right of way out to sea, as the schooner had across to Jersey City, and all that could be reasonably expected of her was, that she

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The Steamer City of Paris.

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should pursue her course at a moderate rate of speed, and keep a sharp lookout."

The sailing vessel having taken a course which lay across the passage in question, in plain sight, had a right to continue upon it, and the steamer should have stopped before she came to the passage. She had no right of way out through the passage, when the course and speed of the schooner was such as to make it dangerous to attempt to pass through it; having kept on, although at moderate speed, and placed herself in a position involving danger of collision, and well calculated to cause alarm, she must be held responsible for the consequences.

In arriving at this conclusion, I have not overlooked the fact that the schooner was not keeping such a lookout as is required of a sailing vessel when moving across a crowded harbor. If I could see that the careless watch kept on the schooner contributed in a material way to the accident, I should hold her in fault. But with ever so bright a lookout, the schooner would have been bound to hold the course she did up to the luff, and the luff if a false manœuvre, was not caused by want of lookout, but by the dangerous attitude which the steamer was seen to present.

Decree for libellant, with order of reference to ascertain the amount of damage.\*

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\* This decision was affirmed by the Circuit Court, on appeal.

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The Schooner David Faust.

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## Southern District of New York.

MAY, 1867.

## THE SCHOONER DAVID FAUST.

SEAMAN'S WAGES.—RIGHT OF MINOR TO SUE IN HIS OWN NAME.—  
DISCHARGE OF SEAMAN.—TIME TO COMMENCE SUIT FOR WAGES.

Where a minor whose parents were both dead, and who had no guardian, and had for five years been providing for himself and making his own contracts, shipped on a vessel for a voyage which was performed, and on her return left the vessel with the assent of the master before the cargo was discharged, and before the ten days after such discharge was completed commenced proceedings to recover his wages, by taking out a summons before a United States Commissioner, on the return of which no one appeared, and the commissioner gave a certificate, and thereupon the libel was filed and process issued, whereupon the owners of the vessel moved to dismiss the libel on the ground that the libellant being a minor could not sue, but must bring his suit by guardian or next friend, and that the suit was prematurely brought, the ten days after the discharge of the vessel not having expired,

*Held*, That admiralty courts allow a minor to recover in his own name wages earned in sea service, when the contract on which he sues was made personally with him, and it does not appear that he has any parent or guardian or tutor entitled to receive them.

That a suit in admiralty brought to recover wages before the time allowed in the sixth section of the Act of 1790 has elapsed, is prematurely brought, and will be dismissed.

That the fact of the libellant's discharge from the vessel need not be proved by direct evidence, but might be inferred from circumstances.

That the circumstances in this case showed that the libellant was discharged from the vessel.

That where a seaman is discharged from a vessel, the discharge terminates the contract, and the provision for ten days' delay after the delivery of the cargo is released, and the seaman may proceed at once for his wages.

That the libellant's proceedings were, therefore, regular.

This case came up on a motion by the claimants of the schooner David Faust, to dismiss a libel against her, which was filed by David Bailey, to recover wages

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The Schooner David Faust.

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due him for services on board of her on a voyage from New York to Galveston and back. The motion was made and opposed on affidavits, the facts of which sufficiently appear in the opinion of the court.

For libellant, *Beebe, Dean & Donohue.*

For claimants, *A. J. Heath.*

BLATCHFORD, J. This is a motion by the claimants to dismiss the libel, which is filed for seaman's wages, on the following grounds: (1.) That the libellant is a minor, incapable of suing in this court; (2.) That the suit, if maintainable, must be brought in the name of his guardian or next friend; (3.) That the libel was filed before the vessel had completed the discharge of her cargo, and before a reasonable time therefor had elapsed.

The first and second objections are not well taken. Admiralty courts allow a minor to recover in his own name wages earned in sea service when the contract on which he sues was made personally with him, and it does not appear that he has any parent or guardian or tutor entitled to receive his earnings. (*Wicks v. Ellis*, 1 *Abbott's Adm. Rep.* 444; *Larra v. The Henry Buck*, before *Judge Betts*, March, 1847.) In the present case, it appears that the libellant is a native of Peru; that his parents have both of them been dead for five years; that he has no guardian, next friend or tutor, who has any care or control over him; that for the last five years he has been sailing as a seafaring man, and taking care of and providing for himself, and has during all that time made his own contracts and received his own money, and provided for himself; and that he personally made the contract on which the libel is founded. These facts, which are sworn to by the libellant, are not controverted. He is shown to be eighteen years of age, and, as he has been thus accustomed to transact business for

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The Schooner David Faust.

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himself, he is not presumed to require the protection of a next friend or guardian to manage the suit.

The objection that the libel was prematurely filed, is founded on the sixth section of the Act of July 20th, 1790 (1 *U. S. Stat. at Large*, 133.) That section provides, that "as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract; and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners touching the said wages," a summons may issue against the master to appear and show cause why process should not issue against the vessel according to the course of admiralty courts, to answer for the wages. If the master does not appear, or appearing does not show that the wages are paid or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, then, on a certificate of the officer issuing the summons that there is sufficient cause of complaint whereon to found admiralty process, the clerk is directed to issue process against the vessel, and the suit proceeds and judgment is given according to the course of admiralty courts in such cases. The same section provides that nothing contained in it shall prevent a seaman from maintaining an action at common law for the recovery of his wages, or from having immediate process out of any court having admiralty jurisdiction wherever any vessel may be found, in case she shall have left the port of delivery where her voyage ended before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast. The present case does not fall within the provision for immediate process just recited. The libel avers that the libellant shipped in December, 1866, at New York, for a voyage to Galveston, Texas, and back to New York, as a

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mariner, at \$35 a month, and signed shipping articles; that his service commenced on the 13th of December, 1866; that the vessel, with the libellant on board, went to Galveston and back to New York; that the libellant was discharged from the vessel on the 2d of May, 1867; that he performed his duty; and that a balance of wages of \$122.16 is due to him, payment of which is refused by the master. The papers on this motion show that on the 9th of May, 1867, a United States Commissioner issued a summons to the master and owners of the vessel requiring them to appear before him on the next day and show cause why process of attachment should not issue from this court against the vessel, according to the course of admiralty courts, to answer the claim of the libellant for mariner's wages. The summons was served by delivering it on the day it was issued to the chief mate on board of the vessel. On the return of the summons and proof of its service, no person appeared for the vessel, and the commissioner thereupon certified that there was sufficient cause of complaint whereon to found admiralty process in the matter. The libel was filed on the 10th of May, and process was issued upon it and served on the same day.

The affidavits on the part of the claimants show, that the vessel began to discharge her cargo on the 3d of May, and finished on the 11th, and that the discharge was made with all reasonable dispatch. In addition to the averment in the libel as to the discharge of the libellant, he swears, in his affidavit, on this motion, that he was discharged from the vessel before he left her. The master swears that the libellant left the vessel voluntarily on the 2d of May, without being discharged, but with the assent of him, the master.

The construction uniformly given to the sixth section of the Act of 1790 has been that a suit in admiralty, commenced before the time limited by that section, is prematurely brought, and will be dismissed. (The Martha,



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1 *Blatch. & How.* 151.) In the present case, it is insisted by the libellant, that the suit was not prematurely brought, for the reason that the libellant was discharged from the vessel, and it is contended that the provision of the statute requiring ten days to elapse after the discharge of the cargo, does not apply to a case where the seaman is discharged from the vessel. The first question, therefore, to be decided is, whether the libellant was discharged. He swears that he was. The master swears that he was not. But the master also swears that the libellant voluntarily left the vessel with the assent of him, the master. The mate merely swears that the libellant left the vessel immediately on her arrival back at New York. On these facts, certainly, the libellant did not leave the vessel without permission, and there is nothing in the affidavits on the part of the claimants to show that the libellant when he so left had not a right to regard himself as discharged. It is not pretended that the period of the libellant's absence was limited by the master, or that the master notified him to return when he left, or expected him to return, or made any provision on board of the vessel or elsewhere for his support until his wages should be payable, as was clearly the duty of the master on the theory that he was not discharged but merely absent on leave. The fact of a discharge need not be proved by direct evidence, but may be inferred from circumstances, and I must hold in this case that the libellant was discharged from the vessel.

It has always been held in this court, that where a seaman is discharged from a vessel after her arrival, either arbitrarily or with his assent, the discharge terminates the contract, and the provision for ten days' delay after the delivery of the cargo is released, and the seaman may proceed at once for his wages. (*Betts' Adm. Pr.* 61; *The Cadmus*, 1 *Blatch. & How.* 147.) The shipmaster or ship owner may waive the statutory provision in regard to the ten days' delay, and is held to have done

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The Freight Money of the Brig Anastasia.

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so in case he discharges a seaman without paying him his wages.

The proceedings on the part of the libellant were therefore regular, and the motion must be denied.

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## Eastern District of New York.

JUNE, 1867.

### THE FREIGHT MONEY OF THE BRIG ANASTASIA.

**BOTTOMRY.—CHARTERED VESSEL.—PRIOR ADVANCE REPAID OUT OF FREIGHT IN PREFERENCE TO SUBSEQUENT BOTTOMRY.—UNIFORMITY IN MARITIME DECISIONS DESIRABLE.**

The Italian brig *Anastasia* was chartered in Marseilles to the libellant for a voyage to New York for the round sum of £800. The charter-party provided that the master should sign bills of lading without prejudice to it, the loss or profit arising on them to be for account of the charterer; that the ship should be consigned to the charterer's correspondents, and that the charterer should "advance to the captain in Marseilles 4,000 francs on account of the freight, without interest or commissions, the captain paying the premium of insurance." The charterer advanced the 4,000 francs, and the vessel sailed with a cargo, partly the charterer's and partly taken on board by his orders. The freight by the bills of lading amounted to \$3,163.89, in gold, being \$283.89 in excess of the charter money. The vessel on the voyage met with disaster, and her captain took up money for her by bottomry on ship, cargo, and freight, and completed his voyage. The bottomry not being paid, the bondholder filed his libel against ship, freight, and cargo, and the consignees paid the freight into court, and gave bonds for the value of the cargo, which abundantly secured the bond. Thereupon, the charterer filed a libel against the freight, claiming the amount of his advance and the excess above the charter money.

By consent, his libel was treated as a petition, and the libel of the bondholder as an answer to it.

*Held*, That, under the rules which are applied in favor of bottomry bonds as against prior bottomries, mortgages, and other loans to the master or owner, it

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The Freight Money of the Brig Anastasia.

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should be held that a bottomry bond binds not only the ship but her whole earnings. But that a distinction is made in the cases, between advances on freight and other advances, and it is held that sums advanced upon account of the freight must be deducted in preference to the bottomry.

That in this case the freight was, so far as the ship owner was concerned, paid to the extent of the advance, and was not at risk.

That the power to hypothecate by bottomry the cargo as well as the ship, is one conferred by the maritime law to facilitate commerce; and that it will be in furtherance of that object to limit the power as to the freight to the interest of the ship owner in the freight. This will enable a charterer to make an advance without risk of losing his security by a subsequent bottomry, which in many cases will enable a ship to raise money without bottomry, and will work no injustice to shippers of cargo, who, shipping in a chartered ship, may be held to have assented to the terms of the charter which provides for the advance.

That the interests of commerce require uniformity in the maritime law, as administered in the maritime courts of all countries.

In June, 1867, the Italian brig Anastasia, being in the port of Marseilles, was chartered to one Alfred Giraud, for a voyage thence to the port of New York.

The charter-party, among other things, provided that the ship should receive its full and entire cargo at the choice of the charterer; that she should not be laden with merchandise other than that of the charterer or that sent by his order; and that she should sail to New York direct, and there make delivery of the cargo in conformity with the bills of lading, on payment of the freight of the round sum of £600, being for the entire capacity of the vessel. It was also further provided by the charter-party that the master should sign the bills of lading for the freight therein specified, without prejudice to the charter-party, the loss or profit arising thereupon to be for the account of the charterer; that the master should consign his vessel to the correspondents of the charterer in New York, and the charterer should "advance to the captain in Marseilles 4000 francs on account of the freight without interest or commissions, the captain paying the premium of insurance."

In pursuance of this contract the charterer advanced the stipulated sum of 4,000 francs, and the vessel set sail,

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laden with cargo, partly belonging to the charterer, and the balance taken by his orders, the freight list of which amounted to the sum of \$3,163.89, in gold, according to the bills of lading executed by the master in pursuance of the charter-party.

During the voyage the vessel met with disaster, and was compelled to put into Bermuda, where the master raised the sum of £2,500, upon bottomry of the ship, freight, and cargo.

Departing from Bermuda, the vessel arrived in New York, when the master declined to consign her to the correspondents of the charterer, refused to deliver up the bills of lading, or allow them to collect the freight, and neglected to pay the bottomry bond when due. The holder of the bond thereupon filed his libel in this court against ship, freight, and cargo; whereupon the consignees of the cargo paid into court the freight money according to the bills of lading, and the ship and freight being insufficient to discharge the bottomry bond, they gave security for the value of the cargo, thus abundantly securing payment of the bond.

The freight money being thus in the registry, the charterer, Alfred Giraud, filed his libel against it, claiming to be entitled to be paid out of it, in preference to the bondholder, his advance of 4,000 francs, and \$283.89, being the excess of the freight list above the £600 for which the ship was chartered, and praying that the court would marshal the assets and direct payment of these sums to him.

This libel being treated as a petition, and the libel of the bondholder being by consent taken as an answer thereto, and the master having filed an answer setting forth the facts attending the bottomry for the information of the court, but not claiming to be entitled to receive any part of the fund, the cause came up upon the issue so framed and the facts as alleged in the respective pleadings which were admitted to be true.

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*C. M. Da Costa*, in behalf of the charterer, argued the following points :

1. At the time of the execution of the bond, the brig had received, on account of the freight due her from the charterer, the sum of 4,000 francs. The captain, therefore, could not and did not pledge it to the bondholder. Had no bond been given, the ship owner would, of course, have had to make the deduction ; and, in the language of Dr. Lushington, "The bondholder, who stands in the ship owner's place with reference to this freight, must also be subject to the same deduction." (*The Catharine, Swabey*, 264.)

(*a.*) On principle, too, a man cannot pledge what does not belong to him. All that was then due the ship was the charter money, less the advance ; with the freight list the master had, by the terms of the charter-party, no concern.

2. The rule is well settled, that a general hypothecation of the freight by the master in a foreign port, will be construed to include all the freight of the whole voyage, whether earned at the time the bond is made or not, *provided it has not been paid to the master or owner*.

Or, stated in other language :

When freight is included in a bottomry bond, any portion of the freight which has been paid anterior to the date of the bond, is not subject to it. (1 *Parson's Marit. Law*, p. 429 ; *The John*, 3 *W. Rob.* 170 ; *The Cynthia*, 20 *Eng. Law & Eq.* 625 ; *The Catharine, Swabey*, 264 ; *The Standard, Swabey*, 267 ; *The Salacia, Holt's Maritime Law Cases*, 322.)

In this last and latest case, Dr. Lushington reiterates the rule laid down in his former decisions, but adds, that in case the charter-party provides (as it did there) that the advance was to be made for ship's disbursements, it will not be deemed an advance on account of freight, but a loan to the captain, unless the charter authorizes it to

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be deducted on the settlement of the freight. In the case at bar, this distinction does not apply, for the charter-party in express terms says, that it is an advance on account of the freight or charter money.

3. The theory invoked that the bottomry bond saved the adventure, and that therefore the advance should be subject to it, is not tenable for a moment, because—  
1. At the date of the bond, the advance had been paid, and was therefore no longer at risk. 2. Besides, a bondholder has nothing to do with what is at risk or not; all he looks to is the property pledged.

The theory of general average, cannot be, therefore, and never is, invoked in his favor.

What interests, if any, shall contribute in general average, does not concern him, but only the owners of the property pledged, and their underwriters. (*The Gratitude*, 3 *C. Rob.* 264; *Bradlie v. Maryland Ins. Co.* 12 *Peters*, 378, 405, and 406.)

4. The English cases cited under points 1 and 2 are directly in point. The fact that in the case at bar, the charterer himself shipped, only a part of the cargo (the rest being shipped by others with his permission, and by his orders), can make no difference in principle. True, we claim the profit to be for our account, but so would the loss have been. The charter-party expressly provided for the profit or loss being for account of the charterer. Had there been a loss, the bondholder could have compelled the charterer to have paid into court the entire charter money, less the advances.

Besides, it nowhere appears in the English cases, that the charterers were the *sole* shippers of the cargo; and the case of the *John* (*ubi supra*) arose between the bondholder and an assignee of the charter-party.

5. All the equities are with the libellant; the bondholder is amply secured. The value of the cargo, alone, is fully five times as much as his bond.

The court will, therefore, under any circumstances, so

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marshal the assets as to enforce the libellant's claim against the freight, leaving the bondholder to enforce his out of the ship, balance of freight, and cargo. (See the rule as laid down by Dr. Lushington in the *Trident*, 1 *W. Rob.* 29, 35.)

6. The libellant, therefore, is entitled to a decree for the amount claimed, with costs.

*J. S. Ridgway*, for the respondents, presented the following points :

1. The freight pledged to the lender on bottomry, &c., at Bermuda, was the freight expressed in the bills of lading and payable by the consignees of the cargo then on board for the carriage and delivery of said cargo, contradistinguished from the charter money (denominated freight) or hire of the vessel agreed to be paid by charterer to the owner of the vessel.

2. The power of the master, as agent of all concerned, including the charterer of the vessel, as well as the owner thereof and owners of cargo, to so pledge the freight payable for carriage of such cargo, will not be questioned. And in the present case, not only can the general principle be invoked that the master is in that capacity agent of all concerned, including the charterer, but the provision in the charter-party to the effect that the master shall sign bills of lading of cargo shipped, at rates of freight therefor designated by the charterer, is a recognition in express terms of such agency, and sufficient of itself to constitute the master such agent of the charterer, with power to act in his behalf concerning the subject matter.

3. The charterer was owner *pro hac vice*, and as such entitled to the ship's earnings on the voyage, and had undertaken the risks of safe carriage and delivery of the cargo specified in the bills of lading. The freight stipulated in the bills of lading was at risk, and dependent upon safe delivery of said cargo at the port of destination. No

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part of the freight stipulated in said bills of lading had been paid in advance, and the fact of the payment of part, or even the whole of the charter money in advance, does not in a case like the present, of a speculative charter, create or constitute a valid claim or lien by or on the part of such charterer to be reimbursed out of the said freight the amount advanced by him on account of the charter or hire of the vessel, superior to or in preference to that of a lender on bottomry; *for all the freight was at risk*, and by means of the loan on bottomry, &c., was preserved to the benefit of the charterer for whose account and risk said voyage was undertaken and prosecuted. Standing in the position of owner for the voyage, such advance by the charterer, being on account of hire of the vessel and to acquire the control thereof for the voyage for speculative purposes, can be no more the ground of any valid claim to reimbursement of that amount to him out of the freight in preference to the claim and lien of a lender on bottomry, &c., than would the payment of a like sum by a purchaser on account of purchase money or the payment by the absolute owner of such amount to provision the vessel for and dispatch her on the voyage.

The freight on cargo on board, from which the party so advancing (whether owner or charterer) is or expects to be reimbursed with profit, is at risk, and on such freight, preserved and secured by means of such loan, the lender on bottomry has the first claim and lien, and it is such freight that is pledged. (*The Eliza Weddell*, 3 *Hagg.* 87; 2 *Park on Ins.* 881.)

4. The cases (of the *Catharine*, *Swabey*, 264; *John*, 3 *Wm. Rob.* 170; *Cynthia*, 20 *Eng. Law & Eq.* 625; *Standard*, *Swabey*, 267), cited and relied on by the libellant, do not, nor do either of them, support or warrant the conclusion sought to be deduced therefrom by him, and the principle upon which the decisions in each and all of said cases rest, is entirely consistent and in harmony with the



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principle contended for on the part of the bottomry bondholder in the present case. The case before the court differs from the cases so cited, and each of them, in the essential particular and distinguishing fact that in the present case the charter was a "speculative charter," and the freight in the registry is the freight on the cargo of a general ship, payable by the several consignees on delivery of such cargo, and of or on account of which freight no part had been paid in advance, while in the cases so cited it does not appear that the charters were speculative charters, or that there was any cargo on board other than cargo belonging to the charterer or assignees of the charterer, in which cases charter money represents freight on, or compensation for carriage of, cargo on board, and payments in advance on account of such charter money, are substantially and in effect payments in advance of freight on cargo so carried.

5. A bottomry bond operates upon property then the subject of risk.

In consideration of the maritime interest, the lender assumes the risks of perils of the seas to time of termination of the voyage and against which he may insure. And in case of a total loss of vessel and cargo by perils of the seas and without fault of any party, the bond would be of no force or effect further and would cease to operate, even though by its terms freight was pledged and though notwithstanding such loss, the charterer was indebted to the owner of the vessel for or on account of chartermoney or hire of the vessel.

The amount of such indebtedness could not be reached by admiralty process, and not because of any defect in the remedies provided, but on principle; because a lender on bottomry, &c., cannot take maritime interest and at the same time have a claim on or hold as security property not subject to risk or perils of the seas on such voyage; and also because (as in the present case) the freight pledged is the compensation for the carriage of

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goods, *and is in the cargo*; while the charter money or hire of the vessel rests in covenant, and is not in the cargo, except in instances where the charterer, having chartered for the purpose, loads the ship with his own goods on his own account, in which case the charter money represents the cost of carriage of the goods, and is in said cargo, and the lender's claim or lien on same is with such cargo lost or preserved, as the case may be.

6. The equitable principle arising on or having reference to the question of risk and benefit, is applicable in cases of bottomry, &c., none the less than in cases of average; and in charging amount thereof on vessel, freight, or cargo, or on all, as the case may be, courts of admiralty proceed on and apply the equitable principle that property at risk and benefited, shares burthen. (The Dowthorpe, 2 *Wm. Rob.* 74, 81, 85.)

By means of the loan on bottomry, &c., the charterer was enabled to complete the voyage and deliver cargo, without which the entire freight on such cargo, no part having been paid in advance, would have been lost to him.

In the present case the freight and vessel are insufficient to satisfy bond, and resort is then had to cargo, the value of which is over five times the amount of the bond.

The lien exists as against all, but as between parties representing vessel, freight, and cargo, respectively, the burthen which was incurred to enable the vessel to proceed and complete her voyage, falls first on freight and vessel, before resort to the cargo for contribution can be had or will be enforced by the court. The carrier having undertaken to transport and deliver cargo safely at the port of destination, the perils are his, to extent of the vessel and freight at risk. And the expenses incident to the fulfillment of such obligation are a charge thereon, and his means to that extent are to be exhausted in defraying it before resort to cargo is had.

To give effect to the claim of the petitioner in the

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present case, and follow out the theory upon which such claim is sought to be sustained, would in effect reserve for charterer's use, from the earnings on said voyage, the sum claimed by him, free from any lien, claim, or contribution, and in preference even to the claim and lien of a bottomry bondholder for the loan made to save from loss the very money so reserved; would relieve charterer *pro tanto* from risks, hazards, and contingencies incident to the business of carriage of merchandise; and, as between charterer, and owner of cargo, cast upon the cargo such hazard and payment of such additional sum, while yet there remained in the charterer's hands a portion of the freight money paid by consignees for the carriage of said cargo, and not applied by charterer to liquidation of such claim and lien.

7. The motion should therefore be denied, and libel dismissed.

BENEDICT, J. My first impression was adverse to the claim of the charterer, as presented in this case, and I do not now see how the claim can be sustained under the rules which are applied in favor of bottomry bonds as against prior bottomries, mortgages, and other loans to the master or owner. According to those rules it would seem that it should be held that a bottomry bond binds not only the ship but the entire earnings of the ship upon the voyage which is completed by means of the bottomry, in whosoever hands they may be found.

But I find in the cases a distinction made between advances on freight, and other advances, and that it is held that any sums advanced upon account of the freight must be deducted in preference to the bottomry. In the English cases the distinction has been carried so far as to allow the deduction of a sum advanced by a charterer after the execution of a bond upon the whole freight, where the advance was made with knowledge of the bottomry, but in pursuance of a prior stipulation in the

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charter-party. (The *Salacia*, 1 *Holt's Mar. Law Cases*, p. 322 ; less fully reported in 1 *Vernon Lush*. p. 578.)

The language of Dr. Lushington, in the case above cited, seems fully to cover this case, when he says, "can the master or the owner of the ship, by any act of theirs (alluding to bottomry,) without the knowledge or consent of the charterer, cancel or alter the terms of the charter, and especially in a case like this, deprive the charterer of a security for advances he has bound himself to make? I think not." \*

According to the charter-party now under consideration, there was a clear prior agreement for an advance of freight upon the security of the money to be earned by the ship upon the voyage in question, and I do not see that the character of this agreement is at all changed by the provisions relative to the bills of lading, which are inserted to make the security effective ; for although, so far as the charterer is concerned, the freight money named in the bills of lading may be said to be in the cargo and at risk till the termination of the voyage, yet so far as the ship owner is concerned the freight was paid to the extent of the advance, and was not at risk. It was paid by the charterer upon account, and upon the faith of being allowed to deduct it from any sum the ship might earn during the voyage.

This sum, being thus appropriated by the master in consideration of the advance, cannot, according to the case of the *Salacia*, be considered as thereafter within the control of the ship owner or his agent, the master, and so is not affected by the bottomry executed subsequently upon the ship's freight. "The bondholder stands in place of the ship owner with reference to the freight, and must also be subject to the same distinctions." (The *Catherine*, *Swabey*, 264.)

If these principles thus laid down in the English ad-

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\* (See also the case of *The Karnak*, *Law Times Rep. N. S.* vol. 18, p. 661.)

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miralty are to be applied in this case, it follows that this charterer must be allowed, out of the freight in court, the amount which he claims.

Some general considerations affecting contracts of the description here involved, which are becoming frequent in modern commerce, have led me, not without hesitation, to apply to them the principle applied by Dr. Lushington, in the case of the *Salacia*, and they may properly be mentioned here.

The power to hypothecate by bottomry not only the ship of the owner, but the cargo of strangers, is one derived from no absolute necessity, but is conferred by the maritime law in order to facilitate commerce and to enable the ship to mitigate in some degree the effects of those disasters which are attendant upon maritime adventures. It will be in furtherance of the same object to limit this power to the interest of the ship owner in the ship's freight, and the interest of the owners of the cargo in the property on board, inasmuch as, without in any considerable degree affecting the ability of the master to relieve his vessel in case of distress, the limitation above indicated will enable a charterer to make advances to the ship owner upon the security of the freight to be paid upon cargo, whether shipped by him or procured by him to be shipped, without risk of losing the benefit of his security by subsequent bottomry effected by a master whom he does not select and cannot control.

Thus the ship owner will in many cases be enabled to procure employment for his ship, which he could not otherwise obtain, and at the same time an advance for the expenses of the outfit at ordinary interest or without interest, and will thus often avoid resort to bottomry, itself always no inconsiderable disaster. Nor will this limitation work injustice to the cargo on board, for, dealing as the sub-shippers do in a case like the present, with the charterer instead of the ship owner or master as to the rate of freight, and shipping by permis-

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sion of the charterer and for his security and reimbursement, they in fact ship under the charter-party, are put upon inquiry as to its terms, and may justly be presumed to know the extent of their risk and to provide against it.

But if it be said that on general principles the owners of the cargo are entitled to have the value of the vessel and her freight applied to the expenses of the voyage before resort can be had to their property, it may also be said that they are not entitled to have double freight thus applied, and that by shipping in a chartered ship they may well be held to have assented to the terms of the charter, which, by providing for an advance on account of the freight, has withdrawn so much from the ship owner's risk, and to the same extent increased their own; nor can it with much justice be insisted that the rules applied to advances made upon bottomry security should be applied to advances of freight, made as part of a charter and upon the security of the ship's earnings, for the advance of the charterer is not made upon the credit of the ship or of the cargo, but of the freight alone, his interest in the freight over and above the advance is seldom large,—in the present case but \$282,—and often nothing, and it is not permitted to him to exact the maritime interest which is allowed to a bondholder to compensate for the risk of a subsequent bottomry. And here it may be remarked that if the amount of the freight list in this case had amounted to a less sum than the £600, which the ship earned under the charter, as might very well be the case, the bondholder might have with great plausibility insisted that the fund bound by the bond was the charter money payable under the charter-party to the owner, and not the freight which the charterer was to have and collect for his security.

Such considerations as these, and the other important one that the interests of commerce require uniformity in the maritime law as administered in maritime courts of

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all countries, especially in regard to contracts by way of bottomry and charter, are always deemed of weight, if, indeed, not controlling in a court of admiralty, (see remarks of Dr. Lushington in *The Oliver*, 1 *Lush.* p. 492), and they have in this case induced me to uphold the present claim as resting upon a distinction laid down in the English admiralty. I do so, however, not without hesitation, and in the hope and expectation that the soundness of the distinction as well as the correctness of my application of it may be tested by an appeal.

In accordance with these views let a decree be entered in favor the petitioner, with costs. On appeal to the Circuit Court this decree was affirmed as to the amount of the advances, and reversed as to the excess of the freight above the charter money.

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JUNE, 1867.

## THE STEAMER MERRIMAC.\*

SALVAGE.—TROOPS TRANSPORTED BY CONTRACT WITH GOVERNMENT,  
NOT PASSENGERS.

Where a regiment of soldiers of the United States was being transported from New Orleans to New York upon a steamer, under a contract between the owners of the steamer and the government, and the vessel, having sprung a leak, was saved from sinking by the labor of the troops for four days and three nights in bailing the vessel, working under the command of the officers of the regiment, and continuing their labor after the vessel was brought so near shore that she might have been beached or the men landed in boats, and until, by the help of another steamer which came to her assistance, she was brought to the Mississippi bar and was thus saved from a total loss,

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\* This case was before the court previously on exceptions to the libel. See page 68, *ante*.

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*Held*, That the relation of the troops to the ship was not that of passengers, and that they could recover salvage compensation for their services.

That, even if they had been passengers belonging to the ship by virtue of a passenger contract, the court might well award them salvage by reason of the services performed by them after the vessel was in sight of the beach and they could have escaped from her.

This suit was brought to enforce a claim for salvage preferred by a large number of persons formerly comprising a colored regiment of the United States army. The facts were as follows: The steamer Merrimac left the port of New Orleans in the month of November, 1865, bound to this port, laden with cotton and troops. On the morning of Saturday, the 11th, she sprung a leak, which increased to such a degree as to compel her to put back to New Orleans, then some two hundred miles distant. The water soon choked the pumps, and the crew commenced to bail, notwithstanding which the leak gained rapidly and by two o'clock on Sunday morning had fully extinguished the fires, and the engine stopped. Up to this time the effort to keep the vessel afloat had been confined to bailing from the engine room, which had been done at first by the crew, who had been gradually relieved by the men of the regiment, whom the commanding officer had called up, until the labor had passed entirely into the hands of the soldiers. The water, however, continued to gain, and was some seven feet in the hold at this time. The master of the steamer, who appears to have been a competent man, and whose conduct does him credit, then informed the major commanding that the work of bailing must be made a regular thing by the regiment, whereupon the major issued orders to organize the regiment into two reliefs of five companies each, to work two hours on and two hours off. This was done, and in this manner, under the immediate direction of its officers and under military discipline, the bailing, by hand, by buckets and tubs from places in the engineers' room, and by barrels hoisted by a whip from



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two hatches, was continued by the regiment without intermission and with such success that the water was kept nearly at a stand-still. The crew of the vessel were for the most part engaged in emptying the barrels and in the navigation of the vessel, she being then under sail, but poorly equipped for that purpose, and unable to hold her course upon a wind. On Sunday night a sail appeared in sight, when guns were fired and rockets sent up, in hopes to bring her to their assistance, but without avail. On Monday evening a light was made, which proved to be the Timbalier light, some forty-five miles west of the Mississippi bar. The weather was then fair, and the steamer came to anchor in ten fathoms of water, with the beach in plain sight. Soon after the lights of a vessel were seen and signals of distress were again made, which brought to their aid the steamer Morgan. From this steamer the true position of the Merrimac was learned and more buckets procured, and at the request of the master, the Morgan lay by her during the night, and next morning took her in tow, and towed her to the bar, on which she at once grounded at four P. M., Tuesday. Up to this hour the bailing had been continued by the men of the regiment, directed by its officers, without cessation, night or day. The labor had been severe and exhausting; some of the officers were without sleep for three nights; the water gave out, and was only supplied by a shower of rain which fell. No regular meals were served, and the men would drop asleep as soon as relieved, and were often with difficulty roused again by their officers, who went around for the purpose twenty minutes before each relief was to be put to work. When the vessel anchored off the Timbalier light her position was unknown to the master; but the beach was in plain sight, and while at anchor the water was smooth, so that the steamer could have been beached and the men could have been landed in the boats. No effort was made to abandon her, but, on the contrary, the major stationed

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guards at the boats to prevent any resort to them for that purpose by any one, and his men were kept bailing, the regiment working with the regularity of a machine; and, so far as the leak was concerned, effectually supplying the place of the engine which had been stopped by the water, only ceasing when the steamer reached a place of safety on the bar, within reach of the steam pumps, whence she was towed to her dock.

*Emerson & Goodrich, W. R. Beebe, and E. C. Benedict*, for the libellants, cited the following authorities: 2 *Pars. Mar. Law*, 601, 602; *Walters v. Newman*, 3 *B. & P.* 612, and cases cited; *The Great Eastern*, 11 *Law Times Rep. N. S.* p. 516; *The Joseph Harvey*, 1 *C. Rob.* 307.

*Spencer, Hoes & Metcalf, and C. A. Rapallo*, for the claimants cited the following additional authorities: *Conklin's Adm.* vol. 2, p. 345, 348; *Abbott on Shipping* (6 Am. ed.), p. 669; *The Neptune*, 1 *Hagg.* 236; *The Branston*, 2 *Hagg.* 3; *The Two Friends*, 1 *C. Rob.* 285; *The Salacia*, 2 *Hagg.* 263; *The Hope*, 3 *Hagg.* 423; *The Cora*, 2 *Wash. C. C. Rep.* p. 87; *The Vrede*, 1 *Vern. Lush.* 322.

BENEDICT, J. It cannot be disputed that this valuable steamer, with her cargo, was in a position of very great peril, from which it was rescued by severe and exhausting labor performed by the libellants. But while the service is admitted, it is contended that the case is not one where salvage can be awarded. The main objection of many which have been ably presented by the claimants, is that the persons who performed the service in question were passengers, and that the service consisted of ordinary physical labor, within the line of the duty, which, as passengers, they owed to the ship. To this objection it is answered by the other side that

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the circumstances attending the rendition of the service were extraordinary, and the labor performed was not such as is included in a passenger's duty, and, further, that the libellants were not passengers within the meaning of the rules regarding salvage. The fact that a large steamer leaking as this one was, with from seven to ten feet of water in her hold, was kept afloat for the space of four days and three nights by the process of hand bailing, is undoubtedly an extraordinary occurrence, made possible in this case only by the circumstance that this large number of men were kept constantly at work and with great efficiency by the powerful aid of military discipline, judiciously but firmly applied by the officers of the regiment; but it may admit of doubt whether the circumstances were such as to change the character of the service and take it out of the category of ordinary labor, which it is said may be required of a passenger belonging to a ship which is in danger.

The determination of this question is unnecessary in the present case, inasmuch as I am of the opinion that the libellants did not sustain that relation to this steamer which is designated by the word "passenger" in the rules applied to salvage demands. The reason of the rule in question indicates the class of persons to which it relates. Passengers are not allowed salvage reward for ordinary labor performed by them in saving their ship, because such labor is made the duty of the passenger by the pre-existing contract under which he connected himself with the ship. (3 *Kent*, 314.) Manifestly such a duty, the liability to which and the extent of which must vary according to the voyage, the character and outfit of the vessel, the competency of her master, and many other like circumstances peculiar to each case, can only arise out of a voluntary agreement. The duty rests in contract. It is a "covenanted allegiance:" the pre-existing covenant spoken of by Lord Stowell. (The *Neptune*, 1 *Hagg.* 236.) This being so, I am unable to see how the libel-

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lants are to be considered as within the rule. They made no contract with the ship, had no power of selection of the ship, or the voyage even. They paid no passage money and incurred no liability for any. They acquired no right of action against the ship in case of failure to transport them. They were not fed or furnished by the ship, and had no interest whatever in being transported in her, but were men simply compelled by the orders of their superior officers to go on board this vessel at a certain time, to leave again whenever ordered by their officers. The government, it is true, had contracted with the ship for the transportation of this body of troops from New Orleans to New York, and to pay for their transportation, but privity of contract between the men and the ship, which would make ordinary labor for the ship in distress a duty, is wanting. That the position of these men on board was not considered by the master to be that of ordinary passengers is apparent from the fact in evidence that the master issued no orders to them, and did not undertake to direct their labors, but applied to the commanding officer of the regiment to issue his orders and to keep them to the work under his direction. This view is also confirmed by the circumstance which, although not recollected by the master, is proved by Major Bumstead, the commanding officer, whose appearance and mode of giving his evidence add weight to his statement, that when the master first spoke to him of the likelihood of being compelled to call upon him for men to assist in bailing, he said that the men, of course, should be paid. But it is said that the men were not the crew or the cargo, and, therefore, must have been passengers. This does not follow. A man may personally be on board a ship and be neither master, crew, nor cargo, and yet not sustain the legal relation of passenger, as was held by Dr. Lushington in the case of the *Hanna*, *Law Times Rep.* vol. 15, p. 334. My conclusion, therefore, is that the service performed by the libellants

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cannot be held to have been performed by them in the line of any duty as being passengers. Having thus disposed of the main question, it is only necessary to say that the other objections raised by the claimants, have been heretofore passed on by the court. The fact that they were soldiers and in peculiar relations to the government, is no defence, as many cases in the books will show. That they saved their own lives with the ship does not bar them from reward, nor is it good ground of objection that they did only what was their bounden duty as men. It is, indeed, the bounden duty of every man to labor when he can to save the lives and property of his fellow man. And it is to encourage the performance of this duty that the maritime law, out of considerations of public policy, awards compensation for its performance. Performance of a duty imposed by contract is not rewarded, but services rendered in pursuance of the dictates of humanity, and prompted by a desire to perform the obligations which attach to every man, these are the very services which, when they result in the saving of property, are rewarded by a court of admiralty. Again, it is said, that the services involved no risk, enterprise, or disinterestedness, and that these are necessary characteristics of every salvage service. The rule is stated too broadly. (*The Clifton*, 3 *Hagg.* 121; *The Enterprise*, *Shipping Gazette*, 1854; *The Black*, *Shipping Gazette*, 1854; *The Purissima Conception*, 3 *W. Rob.* 184.) And besides, this service was not wholly wanting in these characteristics. The labor here performed might well involve risk to health, and certainly the mode of its performance under the circumstances, displayed much patience, willingness, and subordination.

The case presents another feature which is entitled to notice here. It appears in evidence here, that when the steamer reached the place where she anchored, the beach was in plain sight. The weather was then fine,

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and the sea soon became smooth. The steamer could then have been beached, or the troops landed in the boats; instead of which, guards were stationed at the boats by the major commanding, to prevent any one from attempting to resort to them, and the men were kept at the exhausting labor all that night and during the next day, and until the steamer was safely grounded on the Mississippi bar. This labor, performed after the steamer came to anchor, was for the sole purpose of saving the ship and cargo. Had the bailing been stopped, the steamer would have sunk and been lost, although the lives of those on board would have been saved. And this labor was willingly performed by men who were already worn with labor, want of sleep, and proper food, and who had the physical power to control the ship as well as their own actions. This feature of the case might justify an award to the libellants, even if they had been passengers belonging to the ship by virtue of a passenger contract; but I do not rest my decision upon this ground, but upon the ground that the libellants were not passengers, within the meaning of the rule which denies compensation to passengers, and are consequently entitled to a proper reward for the labor they performed, and I deem the considerations of public policy, upon which the whole doctrine of salvage rests, to be fully applicable to the present case, and to require that the good order, patience, and willingness with which this large body of men—soldiers as they were, with arms and the power to provide as they pleased for their own safety—labored constantly to keep the ship afloat, should be recognized in a court of admiralty. There remains to determine the amount proper to be awarded. Upon this question, as the case is peculiar, not only in some of the circumstances attending the service, but in the number of persons claiming to be rewarded, and as no argument upon this point is submitted in behalf of the

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The Circassian.

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claimants, I desire before determining it to hear the views of counsel.\*

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JUNE, 1867.

THE CIRCASSIAN.

LIEN.—STEVEDORE'S WORK.—JURISDICTION.

Where a libel was filed to recover for stevedore's services, and exceptions were filed to it on the ground that the services were not maritime, and therefore the claim was not within the jurisdiction,

*Held*, That though the court would be disposed, if the question were a new one, to hold that such services were maritime, yet as the question had been repeatedly determined otherwise in the Southern District, the law of those decisions would be followed until modified by concurrent action on the part of both courts, or by the Circuit Court on appeal.

The libel in this case was filed by James Adams to recover for stevedore services performed in taking in, storing, and in breaking out and landing cargo of the steamer *Circassian*. Exceptions were filed to it upon the ground that the services were not of a maritime character, and not within the jurisdiction of the court.

For libellant, *Mr. O'Sullivan*.

For claimant, *T. E. Stillman*.

BENEDICT, J. I confess that I have never been able

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\* On hearing counsel, the court fixed the amount of salvage at two months' pay for each officer and man, according to the rate received by them in the military service. There were three hundred and fifty-one persons who appeared as libellants in the suit. The vessel was valued at two hundred and fifty thousand dollars, and the amount of salvage decreed was twenty thousand five hundred and thirteen dollars. No appeal was taken from the decree.

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The Steamer Merrimac.

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to see any sound distinction between the nature of the services performed in stowing and breaking out the cargo of a ship, and the services performed in its transportation. The stowage and the landing of the cargo form a necessary part of the contract of affreightment. Without the performance of this duty no freight can be earned. The safety of the ship and of the cargo depends in a great measure upon the care and skill displayed in the performance of this duty, and for its non-performance in a proper manner the ship is liable in the admiralty. It is a service which, when performed by the crew, as is frequently the case, is considered a maritime service, and compensated in the admiralty under the name of wages. And when not performed by the crew, it devolves upon a class as clearly identified with maritime affairs as are the mariners, and fitted for the duty by a special and peculiar experience.

These considerations seem to me sufficient to establish the maritime character of the service, and to bring it within the admiralty and maritime jurisdiction of the District courts, and were the question a new one I should so hold.

But I do not feel at liberty to follow my individual opinion; for, although the question is now for the first time presented in this district, it has been repeatedly decided by Judge Betts adversely to the jurisdiction, and when a question frequently arising in the past has been thus settled, so far as the District Court is concerned, by decisions in the Southern District, I consider it to be my duty to declare the same law here, until the rule shall be modified by concurrent action on the part of the two District courts, or by the Circuit Court on appeal.

The exception is therefore allowed, but without costs, and leave given the libellant to file an amended libel within ten days.



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The Ferry Boat New York.

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JUNE, 1867.

## THE FERRY BOAT NEW YORK.

## COLLISION IN EAST RIVER.—EVIDENCE.

Where a bark in tow of a steamtug was injured by a collision with a ferry boat, on a clear day, the vessels having seen each other at abundant distance to have avoided each other, and the testimony was in conflict; but the man at the wheel of the bark was not called, nor his absence accounted for, while the man in charge of the tug testified that the ferry boat did not stop, though under full headway, till she was within ten feet of the bark, and then did not reverse her engine,

*Held*, That such a collision must have been the result of carelessness.

That the statement of the man from the tug must be incorrect; such a blow would have produced far other injuries, and the statement is a case of gross exaggeration.

That such a tendency to misdescribe, causes mistrust in the libellant's case; and a decree will not be rendered in his favor on such testimony.

This was an action by Lewis Foster, owner of the bark *Free Trade*, to recover for injuries sustained by the bark in a collision with the ferry boat *New York*, on the 28th of October, 1865.

The accident happened in the harbor of New York, off the South Ferry slip, on the New York side, on the morning of a clear day. The tide was young flood, the wind light, and the vessels in no way embarrassed by other vessels.

The witnesses on both sides agreed that the ferry-boat was heading for her slip, and that the bark, having a steamtug upon her starboard quarter, was being towed out of the East River on a westerly course, across the mouth of the slip, and at right angles with the direction of the ferry boat.

The evidence also showed that the bark was struck upon her larboard side, amidships.

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The Ferry Boat New York.

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As to the other elements of the case, the evidence was in direct conflict. The witnesses for the ferry-boat declared that the ferry boat had stopped before the approach of the bark, and lay in the river waiting for another ferry boat to vacate the slip; that the bark came down inside the ferry boat and where there was plenty of room for her to pass in safety, and that instead of keeping her course, when near the ferry boat the bark sheered off toward her, upon seeing which the ferry boat instantly backed, but the sheer of the bark was so sudden that she came upon the ferry boat before the latter had time to back out of her way. The witnesses for the bark denied the sheer or any other change of course, and said that the ferry boat was on a course at right angles to the course of the bark, and that she kept her course and speed until the moment of a collision, when she brought up square upon the starboard side of the bark.

For libellant, *A. J. Heath.*

For claimants, *B. D. Silliman.*

BENEDICT, J. It is manifest that this collision, happening as it did on a clear day, between two vessels which saw each other at abundant distance to avoid accident, was the result of carelessness, but where the negligence was is not clear. I notice this, however, that the man at the wheel of the bark, who from his position and duty would be best able to say whether the course of the bark was or was not changed, as charged by the claimant, is not called as a witness, nor is any attempt made to account for his absence, while the person in charge of the tug, and who was, as he said, responsible for the movements of the bark, is positive in the assertion that he saw the ferry boat all the time; that she was under full headway, and did not check her speed till within about ten feet of the bark's side, when she first stopped her engine but did not reverse.

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The Ferry Boat New York.

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This statement, flatly contradicted by the men on the ferry boat, must be wholly incorrect. A ferry boat like the New York approaching the bark head on, and keeping full speed till within a few feet, would have produced results far different from the injuries caused here. This is a case not of miscalculation of distances or wrong estimate of time, but as it seems to me of gross exaggeration on the part of a most important and intelligent witness in charge of the injured vessel, and from whom the court was entitled to receive a frank and accurate account of what took place.

The exhibition of such a tendency to misdescribe the occurrence, makes me distrustful of the libellant's case, and unwilling to render a decree upon such testimony.

I shall therefore dismiss the libel and leave the libellant to prove his case, if he can, before the appellate court, by calling his wheelsman and some of the many passengers who saw the accident, and who may be able to give reliable information as to what was the action of the two vessels on the occasion in question.

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## Southern District of New York.

JUNE, 1867.

### FOUR CASES SILK RIBBONS, MARKED S. & C., 1208, 1210, 1211, 1213.

#### PRACTICE.—BONDING GOODS SEIZED IN WAREHOUSE.—VALUATION.— DUTIES.

Where goods which had been entered for warehouse were libelled by the United States as forfeited, and were attached by the marshal under the process while still in warehouse, and the owners filed a claim to them, and presented a petition to the court praying that the goods be appraised at their cash value, less the duties, that they might be bonded in accordance with the eighty-ninth section of the Act of March 2d, 1799 (1 Stat. at Large, 696):

*Held*, That the practice of giving the bond in such cases, in the amount of the value of the property, less the duties, is correct, and will continue to be the practice of this court till overruled by superior authority.

The case of the United States *v.* Segars, Mayo *et al.* claimants (16 *Legal Intelligencer*, 388), commented on.

This was a petition by Sarasin & Co., of Bale, Switzerland, the owners and claimants of the goods proceeded against in this suit, praying for an order that the goods be appraised at their cash value in the city of New York, less the duties legally chargeable thereon; and that, upon filing such appraisement and a certificate from the collector and naval officer of the port of New York, that the duties on the goods have been paid, or secured to be paid, the goods be delivered to the claimants, on their executing to the United States a bond, with sureties, according to the statute in such case made and provided.

The goods were imported in August, 1866, and entered for warehouse under the acts of August 6th, 1846 (9

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*U. S. Stat. at Large*, 53), March 28th, 1854 (10 *Id.* 270), and March 14th, 1866 (14 *Id.* 8). The general provisions of those acts are, that goods entered for warehouse may remain in warehouse, under bond, for a limited time, without the payment of duties, subject to withdrawal for consumption on payment of duties, and to withdrawal for re-exportation without payment of duties. The bond under which the goods are warehoused, is a bond to secure the proper duties and expenses, to be ascertained on the entry for warehousing (Act of August 30th, 1842, § 12, as amended by Act of August 6th, 1846, § 1, 9 *U. S. Stat. at Large*, 53). In the present case, such bond was given. Afterward, and in October, 1866, the goods, while still in warehouse, were seized by the collector as forfeited, under the provisions of the fourth section of the act of May 28th, 1830 (4 *U. S. Stat. at Large*, 410), and the first section of the act of March 3d, 1863 (12 *Id.* 737). A libel of information was filed by the United States, and the goods were attached by the marshal, and were in his custody. A claim to the goods had been filed by the petitioners.

This application was founded on the eighty-ninth section of the act of March 2d, 1799 (1 *Id.* 696), which provides that, on the prayer of any claimant of goods so seized and prosecuted, for their delivery to him, the goods shall be appraised; and if, on the return of the appraisement, "the claimant shall, with one or more sureties, to be approved of by the court, execute a bond in the usual form to the United States, for the payment of a sum equal to the sum at which the \* \* \* goods \* \* \* so prayed to be delivered are appraised, and moreover, produce a certificate from the collector of the district \* \* \* and of the naval officer thereof, if any there be, that the duties on the goods \* \* \* so claimed have been paid or secured in like manner as if the goods \* \* \* had been legally entered, the court shall by rule order such \* \* \* goods \* \* \* to be delivered to the said claimant." The statute

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merely provides that the goods shall be appraised, and that the bond shall provide for the payment of a sum equal to the sum at which the goods are appraised. The claimants insisted that the court should order the goods to be appraised at their cash value in the city of New York, less the duties legally chargeable thereon, and that the bond should be a bond for the payment only of such cash value, less such duties. The district attorney, representing the government, insisted that the goods should be appraised at their cash value in New York, without any deduction of such duties, and that the bond should be given accordingly. The question to be determined by the court was, which was the proper course of procedure.

It was made known to the court, that under instructions from the Treasury department, the officers of the customs had been, for about six months previous, requiring appraisements and bonds, in cases like the present one, for the value of the goods, without any deduction of the duties. Such procedure was said to be generally acquiesced in by the claimants of property seized, but the present application was brought before the court for the purpose of obtaining an adjudication as to the correct practice.

For the United States, *S. G. Courtney*, U. S. District Attorney, and *Thomas Simons*.

For claimants, *Sidney Webster*.

BLATCHFORD, J. This question has heretofore been presented to this court in at least two cases, in which orders for bonding were made in accordance with the views urged by the claimants. One of the cases was that of *The United States v. 1,406 Boxes of Sugar*, marked L. V. H. & Co., in which, February 25th, 1862, an order was made by this court (Judge Betts), that the

property be bonded at its market value, less the duties. But no minutes of any argument of the question before the court and no written opinion are found. The second case referred to was that of *The United States v. 1,382 Hogsheads of Sugar, Charles Luling, claimant*, in which, March 22d, 1862, an order was made by Judge Betts, that the goods seized be bonded by the claimant at their appraised value in this market, exclusive of the duties. In an opinion delivered in this court, by Judge Smalley, in that case, in June, 1862, on a motion made by the United States to set aside an order releasing the goods from custody, it is stated that the question decided by Judge Betts, by the order of March 22d, 1862, was argued before him, and that, after full consideration, he held that the bond should be for the value, less the duties. But in that case, as in the other, no minutes of the argument of the question before Judge Betts are found, nor does the subject appear to have been disposed of by him in a written opinion. The motion before Judge Smalley in the case, turned upon other points than the one now presented for consideration. This court is, therefore, now asked to review the subject, and settle the course of practice for this district.

Under the acts on which the libel in this case is founded, the penalty imposed is the forfeiture of the goods. If the goods are not warehoused, but are entered for consumption and the duties on them are paid, and they are, when seized, in the hands of the importer, he loses, if the goods are forfeited, the duties which he has paid, and the goods also. As the duties on the goods have been paid, those duties enter as an element into the value of the goods at the time of their seizure; and the government, in availing itself of the provisions of the ninetieth section of the Act of March 2d, 1799, in case the goods are condemned and not delivered on bond to a claimant, and selling the goods at auction to the highest bidder, receives the market value of the goods, of which

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value the duties form a part. The government receives just what the importer loses. If, after the government, under such circumstances, seizes the goods for forfeiture, they are bonded at their market value, then, in case they are condemned, the government receives and the importer loses the same amount as if they were not bonded, that is, the duties which have been paid, and the value of the goods in market, into which value the duties enter as a constituent part.

If the duties on the goods have not been paid, and the goods are, when seized, in warehouse under the warehousing acts, with a bond to secure the duties, the property is in a very different situation from that which it is in when it is not warehoused, but is seized in the hands of the importer, after a consumption entry and after the payment of duties. The interpretation uniformly given to the eighty-ninth section of the Act of March 2d, 1799, is that the sum at which the property seized is to be appraised is its value as of the time and place of seizure. The theory is, that the government is entitled, on a forfeiture and condemnation, to the value of the property as it stood at the time of the seizure—at the time it thus came into the hands of the government. When the property is not warehoused, but is seized after a consumption entry, and after the duties on it have been paid, and is then condemned, this theory is carried out by causing the importer to lose and the government to receive, either by a sale of the property, or by a suit on the bond given to procure its release after arrest, what was its value as it came into the possession of the government at the time of its seizure. It is true that, under such circumstances, the government receives, on the consumption entry, the duties on the property, and that afterward those duties enter into the price or value which the government receives for the property, after it is condemned; and thus, according to a form of speech, the government may be said to receive, and the importer



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to pay, the amount of the duties twice. But this is a fallacy. The duties are first paid as duties on the consumption entry, and then the property becomes part of the common stock of the country, and enters into its markets, and has a merchantable value, composed of all the elements which go to make up such value, such as cost of manufacture, freight, commissions, duties, mercantile profit, and other items. That value it is, which, when the property is seized under such a state of facts, passes from the importer to the government; and the importer necessarily loses the duties he has paid, and the money value of the property, which otherwise would have gone into his own pocket—no more and no less. But when the property is in warehouse, under a bond to secure the duties, it is there subject to withdrawal for consumption on payment of duties, or to withdrawal for re-exportation without payment of duties. If seized while so in warehouse, it has, at the time of seizure, a value composed of very different elements, so far as the question now under consideration is concerned, from those which compose its value when it is not in warehouse, but is seized in the hands of its importer, after a consumption entry and after the payment of duties. If sold by the importer while so in warehouse under bond, the duties do not form an element of its price or value. The purchaser pays to the importer the value of the property, not including any duties, and afterward pays the duties on withdrawing the property for consumption, or re-exports it without paying duties. The property cannot, while in warehouse under bond for the duties, be put into market for consumption, so as to have the duties enter as an element into its value; and if it is withdrawn for re-exportation, the duties can never enter into its value in any market in this country under its existing importation. These views show, that when property in warehouse under bond for duties is seized, the duties form no part of its value at the time it is

seized. Now, applying the remedies which the law gives to the government to this state of facts, these consequences follow. If the government enforces the forfeiture, and the property is not released on bond, but is sold, the government receives for it, by putting it into market, a price into which the duties enter as a component part (the property, when sold, being put into competition with other property of the same kind which has paid duties), and thus the government receives not only what was the value of the property to the importer at the time of the seizure, but also an additional value representing the amount of duties. Thus, the government virtually receives the duties on the property, and also its value at the time of seizure. It receives what the importer ought to lose, namely, the value of the property to the importer at the time of its seizure; and it also practically receives the duties, by receiving the same price for the property which it would bring if it had paid duties. It also claims the right to enforce against the importer the bond for duties given on the entry for warehouse. If it should be allowed to enforce that bond, then, in such case, as in the case where the property was condemned and sold on being seized while not in warehouse, but while in the hands of the importer, after a consumption entry and after the payment of duties, it would seem to receive the amount of the duties twice. But this again is specious. The bond for duties given by the importer, if enforceable, would be enforced by reason of the voluntary act of the importer in giving it. The transaction of giving such bond, and any rights of the government under it, are separate and distinct from the rights acquired by the government by virtue of any fraud which justifies the seizure of the property. As to what the government receives as representing duties when it sells the property in market, it receives that as an incident of sovereignty. The property has virtually been imported by the government itself, and it has the

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right to put it into the market, and all it receives for it, as representing duties on like property, is clear gain. But such gain arises from the principle that the government pays no duties on articles imported by itself. If the government imports property which is afterward sold by it, it receives on the sale a price into which the amount of duties on like property, when imported by an individual, enters as a constituent part, and the gain thereby accruing to the government is an inherent incident of its sovereign right. But, although the course of proceeding in the case of a sale on forfeiture where the goods are in warehouse under bond, may bear the semblance of giving to the government the amount of the duties on the property twice, in addition to the value of the property to the importer at the time of its seizure, yet the importer loses nothing but what was the value to him of the property at that time; and, if the bond given by him for the duties is enforced, he loses those also.

At this stage comes up the question now presented for decision. If the property proceeded against in this suit is released on a bond such as the government insists on—namely, a bond for the value of the property when seized, including the duties—and the property is condemned in the suit, the government will receive, under such bond, not only the value of the property to the importer at the time of seizure, but also an additional value, representing the amount of the duties; and, besides that, it will receive the duties imposed by the collector, in case the goods are withdrawn for consumption. It will thus receive, in all, just what it would receive in case the property were condemned and sold, on its seizure while not in warehouse, but while in the hands of the importer, after a consumption entry, and after the payment of duties. And it will not receive that full amount, if a bond for the value, less the duties, is given. But it has been already shown that the warehousing system introduces a change, to the full benefits

of which the importer is entitled. Where the property is not warehoused, the government receives the duties ; and if it afterward seizes and condemns the property, it receives its full market value. If the property is warehoused, and then seized, condemned, and sold, without being delivered to the claimant on bond, the government acquires the title to the property, and sells it in like manner as if it had itself imported it. But in case such a bond as the government claims to receive in the present case is given, the importer will, as we have seen, lose, if the property is condemned in the suit, not only what was the value to him of the property, in warehouse, at the time of its seizure, but, in addition, a sum equal to the amount of the duties legally chargeable thereon ; and if, after thus bonding the property, he withdraws it for consumption, he must pay the duties on it in cash to the collector, notwithstanding the amount of them has been included in such delivery bond. He will thus, in case of a condemnation, lose more than he would if the property were not delivered to him on bond, but were to remain in the hands of the government, and be sold by it. In each case, the same offence is charged and has been committed, for which the property is forfeited. In each case the property is in warehouse, under bond for the duties. The merchandise is equally guilty in each case ; but, if the claimant seeks to avail himself of the privilege of bonding his property when it is seized while in warehouse, he cannot do so, according to the views urged by the government, without imposing upon himself a liability, in case the property is condemned, which he will not incur if he leaves the property in the hands of the government. Such a result is opposed to the spirit and intent of the eighty-ninth section of the Act of March 2d, 1799. One of the principal points involved in the case before referred to, decided by Judge Smalley, was, whether the bonding system, provided for cases of seizure by the eighty-ninth section of that act, applied

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to property seized while in warehouse. He decided that it did so apply, and that it was the intention of Congress that the merchant should have the full benefits and advantages of the warehousing system. To require from him such a bond as the government claims, would be to deprive him practically of the benefit of bonding warehoused property seized and prosecuted while in warehouse. But if the property is delivered to the claimant on a bond for its value when seized, not including the duties, then, if the property is condemned in the suit, the importer will lose the same amount as if he had not bonded the property, and no more; and will thus have the full benefit of the privileges of the warehouse system, and the full benefit of the system of bonding provided by the eighty-ninth section of the Act of 1799.

It is claimed by the government that this view is contrary to the decision of Judge Cadwalader, in the District Court of Philadelphia, in the case of *The United States v. Segars, Mayoz and others*, claimants (16 *Legal Intelligencer*, 388; 3 *Philadelphia Reports*, 517). It does not appear, in the report of that case, that the property seized was in warehouse. The question before the court for decision, as stated in the opinion, was whether the amount of regular duties payable on the property, if legally entered, was to be deducted by the appraisers in ascertaining the value for which the delivery bond should be given; or, in other words, whether, in case of condemnation, the claimant should lose the amount of those duties, as well as the value of the property forfeited. The court does not, in its opinion, allude to the warehousing acts, or discuss the question in reference to property seized while in warehouse. It lays down the principle, that if the property is to be delivered to the claimant, on substituting for it a bond, under the eighty-ninth section of the Act of 1799, that bond should be a substitute for the *full value* of the property. Such full value the court, in that case, held to be the market

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value, without a deduction of the amount of the duties. Where property is seized in the hands of the importer, after a consumption entry, and after the duties are paid, the full value of the property to the importer, at the time of the seizure, necessarily includes the duties, as we have seen. But where property in warehouse under bond for duties is seized, the full value of the property to the importer at the time of seizure does not include the duties. The delivery bond is intended to be a substitute for the full value of the property to the importer at the time of seizure, and for nothing more.

Uniformity of principle and equal justice to the importer in all cases of seizure can be carried out only by varying the basis of appraisement in the manner indicated, in cases of delivery bonds on seizures of property in warehouse. It is said by Judge Cadwalader, in his opinion, that the circumstance that the duties have not been paid when the proceeding to forfeit the property is instituted, is, in reason, attended with no difference in favor of the importer. That is very true. But it is equally true that the circumstance that he has availed himself of the provisions of the warehousing acts, and given a bond for the duties, instead of paying them, ought not to work a difference against him. Such a difference is manifestly worked if he is compelled, as a condition of obtaining a release of his property from seizure, to give such a bond as the government claims in this case.

While I regret to seem to differ from so experienced and able a jurist as Judge Cadwalader, I am satisfied, after thorough reflection, that the principle laid down by Judge Betts, and always adhered to by him, in regard to the amount of the bond to be required in cases of seizures and prosecutions for forfeiture of property in warehouse under bond for duties, was correct. Such will continue to be the ruling of this court in like cases, until varied by superior authority.

The prayer of the petition is granted.

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In the Matter of the Petition of the Spanish Consul at New York.

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JUNE, 1867.

IN THE MATTER OF THE PETITION OF THE  
SPANISH CONSUL AT NEW YORK.

FOREIGN COMMISSION.—SUMMONING WITNESSES.—POWER OF THE  
COURT.

Where a commission was issued by a judge in Cuba to the Spanish consul in New York to take testimony to be used in a criminal prosecution for swindling, and the consul thereupon applied to the District Court for a summons to compel the witness to appear and testify:

*Held*, That the only provisions made by Congress on the subject of enforcing the giving of testimony in judicial proceedings pending in a foreign country, are found in the acts of March 2d, 1855 (10 *Stats. at Large*, 630), and of March 3d, 1863 (12 *Id.* 769).

That neither of those acts applied to this case, and the court had no power to issue the summons asked for.

BLATCHFORD, J. The petitioner, who is the consul of Her Majesty the Queen of Spain at the port of New York, represents that he has received from the judge of the Southern District of Santiago, in the island of Cuba, a commission, empowering him to take the testimony of certain witnesses named therein, to be used in a criminal prosecution for swindling, a translation of which commission he produces, and he prays that a summons may be issued by me requiring the witnesses to attend and testify. I have no power to issue the summons asked for. The only provisions made by Congress, on the subject of enforcing the giving of testimony in judicial proceedings pending in a foreign country, are those found in the Act of March 2d, 1855 (10 *U. S. Stat. at Large*, 630, §2), and in the Act of March 3d, 1863 (12 *Id.* 769). The former provides that "where letters rogatory shall have been addressed from any court of a foreign country to

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any Circuit Court of the United States, and a United States commissioner designated by said Circuit Court to make the examination of witnesses in said letters mentioned, said commissioner shall be empowered to compel the witnesses to appear and depose in the same manner as to appear and testify in court." The latter act is confined to the taking of testimony to be used in a suit for the recovery of money or property depending in a court of a country with which the United States are at peace, and in which the government of such foreign country is a party or has an interest.

The prayer of the petition is denied.

*Coudert Brothers*, for the petitioner.

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JUNE, 1867.

## THE BARK HEROINE.

## DAMAGES BY COLLISION.—FREIGHT.

Where a vessel, while on a voyage was injured by a collision with the Heroine, and in a suit against the Heroine a decree was rendered in favor of her owners, with a reference to a commissioner to ascertain the damages, and the commissioner reported as an item of damage the gross freight, and the claimants excepted:

*Held*, That the freight which a vessel, injured in a collision, was earning and has lost, is allowable as an item of damage.

That this must be net freight.

That there must be deducted from the gross freight, the expenses the vessel would have incurred if the voyage had been successfully performed, and which would have diminished by so much the gross freight.

This case came up on exception to a commissioner's report. The suit was brought by Isaac Pratt, Jr., and others, owners of the bark Alma against the bark Heroine, to recover the damages occasioned by a collision between the two vessels. The court decided in



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favor of the libellants, and referred it to a commissioner to ascertain the damages. The commissioner's report included in the damages an item of \$1,040 for freight lost, and the claimants excepted to the allowance of that item.

For libellants, *A. J. Heath*.

For claimants, *E. D. McCarthy*.

BLATCHFORD, J. I think that the libellants are entitled, as part of the damages sustained by them by the collision, to an allowance on account of the freight their vessel was earning at the time of the collision on the cargo she was in the act of carrying. The libel expressly claims as damage the loss of the vessel and her freight, and states the aggregate amount of such damage at a larger amount than the commissioner has reported it to be. Upon the well-settled principle of allowing to the injured party as damages, in cases of collision, an indemnity to the extent of the loss sustained, the freight which the injured vessel was in the act of earning and has lost, is allowed as a just measure of compensation. (*The Gazelle*, 2 *W. Rob.* 279; *Williamson v. Barrett*, 13 *How.* 101, 111.) But this must be net freight, not gross freight. There must be deducted from the freight the vessel was engaged in earning, the expenses she would have incurred if the voyage had been successfully performed, and which expenses would have diminished by so much the gross freight. In the present case the amount of freight allowed is \$1,040. The exception to the commissioner's report is to the allowance of freight to that amount. The \$1,040 is the gross freight, as testified to by the master in a deposition given by him for the hearing on the merits. The questions as to the amount of the freight, and as to what was the gross freight, and what were proper deductions from it, and what was the net

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freight, were not raised before the commissioner. Hence the error in his report. Substantial justice will be done by referring the case back to the commissioner for re-examination on further evidence by both parties, in accordance with the principles of this decision.

Order accordingly.

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JUNE, 1867.

THE BRIG BLOHM.

SEAMAN'S WAGES.—PRIORITIES.—LIEN.—HAMBURG CODE.—EXTRA PAY ON SALE OF VESSEL ABROAD.—MORTGAGOR.—THE GOLD QUESTION.

Seamen shipped in Hamburg for a voyage to New York and back. In New York the vessel was sold by a decree of the court of admiralty for advances, and the purchaser discharged the seamen, who, thereupon, petitioned to have their wages, with two months' extra pay, paid first out of the fund:

*Held*, That a sailor who was made second mate was entitled to a second mate's wages from the time of his appointment.

That a sailor shipped in New York, who rendered services on board in port only, was entitled to a lien for his wages.

That the Hamburg law was part of the contract of these seamen, and that, by that code, when a vessel is prevented by higher power from completing the voyage, and the crew are discharged, they are entitled to a free passage home, or two months' extra pay.

That the sale of this vessel by decree of court was a "preventing by higher power," and that, as no free passage to Hamburg had been provided, the seamen were entitled to the two months' extra pay, and had a lien on the proceeds for it.

That a mate who had loaned money to the master and taken from him an agreement, in place of interest, to divide all profit and loss, as if he were part owner, was only a mortgagee, and was entitled to recover his wages as mate.

That an increase of wages by the master in New York did not give the sailors a lien for such increase prior to that of creditors for advances to the vessel.

That the Act of March 8d, 1843, fixing the value of the "mark," does not apply to its value for commercial purposes, and that such value is a matter of evidence.

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That the amount decreed to the seamen must be the amount of their wages, in Hamburg money, reduced into coined dollars of the United States, without adding anything by reason of the premium on gold.

The brig Blohm, a Hamburg vessel, shipped a crew in Hamburg for a voyage to New York and back, at various rates of wages, payable in *marks courant*. After the vessel had arrived in New York, the second mate left her, and one of the crew, named Struck, was appointed second mate in his place, and another sailor, named Ternan, was shipped to supply Struck's place.

While the vessel lay in New York, the master, as it appeared, agreed to raise the wages of the rest of the crew above the rate specified in the articles.

After this agreement was made, the vessel was libelled in the court of admiralty for advances made to her, and was sold under a decree of the court, whereupon the crew applied, by petition, to the court for their wages, and for two months' extra wages, under the Hamburg code. The proceeds of the vessel not being sufficient to pay the sailors' claim and also the decree for the advances, the amount of the sailors' claim was contested by the libellants, in whose favor that decree was made.

The libellants contested the claim of the sailors on the following grounds:

1. They claimed that, even if the master did advance the men's wages, their own claim should be paid in preference to such advance.

2. They claimed that Ternan having only rendered services in port, had no lien on the vessel or her proceeds.

3. They claimed that the two months' extra pay was not a lien on the vessel.

4. They claimed that the mate, Vogelgesang, was really a part owner of the vessel, and, therefore, could not claim a lien on her for his wages.

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This claim was based on the fact that in August, 1865, while the bark was in Hamburg, the mate loaned Tiedemann, who was master and owner of her, seven thousand thalers, and, on the 14th August, 1865, they entered into a written agreement, which recited that Vogelgesang had loaned Tiedemann that amount, for the purchase of the brig Blohm, and provided that, "for increased security of this capital, Tiedemann mortgages to Vogelgesang the vessel, and gives him the first mortgage for this money, and that, instead of paying interest, the parties agree that they shall divide all profit and loss, the same as if he was a part owner. It was also agreed, that in case Vogelgesang should die, his share of the profit or loss should be for the benefit of another party. And, by a subsequent article, dated in September, the parties agreed that, in case of Vogelgesang's death, the money should be paid to this third party with five per cent. interest, and the vessel should be mortgaged to him till it was paid.

5. The libellants also claimed that the amounts to be paid the seamen should be calculated by reducing the *marks courant* to dollars of the coin of the United States, and giving them a decree for that amount, while the seamen claimed that the amount of the premium on gold in New York at the time should be added, in calculating the amounts decreed to them.

For petitioner, *J. K. Hill.*

For libellants, *C. M. Da Costa.*

BLATCHFORD, J. The contract of August 14th, 1865, with the supplemental contract of September 11th, 1865, between Vogelgesang, the mate, and Tiedemann, the master of the vessel, was merely a mortgage of the vessel to Vogelgesang as a creditor of Tiedemann, and did not constitute Vogelgesang a part owner of the vessel. He

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is, therefore, entitled to his wages, as mate, of 84 marks courant per month.

As to Ternan, the man shipped at New York, he was shipped to supply the place of Struck, who was promoted to be second mate, in place of a second mate whom the master had discharged. No objection is made to the promotion of Struck ; and the employment of Ternan, under the circumstances, was proper. He is, therefore, entitled to his wages of 60 marks courant per month.

Struck is entitled to his wages as seaman, at 42 marks courant per month, to February 5th, 1867, and, from that time, to wages, as second mate, at 60 marks courant per month.

The alleged increase of the wages of Adams, Ahrent, and Struve, made February 5th, 1867, cannot be admitted. They shipped for the round voyage back to Hamburg, and it does not sufficiently appear that the agreement made by the master to raise their wages from the 5th of February, 1867, was a voluntary act on his part by which the vessel ought to be bound, especially as against creditors advancing money on the strength of a lien on the vessel. Accordingly, Adams, Ahrent, and Struve are entitled to wages for the whole time since they shipped at the rates named in the shipping articles and no more, namely : Adams, 27 marks courant per month ; Ahrent, 21 marks courant per month ; and Struve, 12 marks courant per month.

The Hamburg law formed part of the contract with these seamen, and, according to that, I think that each of the crew is entitled to either a free passage to Hamburg from New York or to two months' extra wages. It is urged that this cannot be enforced as wages, and is not a lien, but is merely a penalty enforceable against the master and owners personally. It is true, that in article 24 of the Hamburg code this two months' wages is called forfeiture money, but in article 25 it is expressly provided that if a vessel is entirely prevented by higher power from the

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continuation of her voyage, the crew have to look for their passage home or money in lieu, according to article 24, entirely to the vessel or the proceeds of the same, and not to the master or owners. In this case, the vessel is a Hamburg vessel and has been prevented, by the *vis major* of a sale under a decree of this court, from continuing her voyage, and the crew have been discharged from her by the purchaser under the sale. The choice as to whether the crew shall have a free passage home or this "distance money," as it is called in article 25, is given by that article to the master. As he appears to have been derelict to all his proper duties, and no free passage home has been provided for the seamen, each of them is entitled to two months' extra wages, at the rate of his ordinary wages, to be paid out of the proceeds in court.

The only remaining question is, as to how the computation is to be made of the amounts due to the seamen. It is shown by the evidence that 125 marks courant are equal to 100 marks banco of Hamburg. The Act of March 3d, 1843, section 1 (5 *U. S. Stat. at Large*, 625), fixes the value of the marc banco of Hamburg at thirty-five cents, in all computations of its value at the custom houses of the United States. This act does not apply to its value for commercial purposes; and, by the Act of February 21st, 1837 (11 *Id.* 163), all former acts declaring foreign gold or silver coins a tender in payment of debts are repealed. The question, therefore, is one of evidence, to be taken before a commissioner, as to the commercial value of the mark courant of Hamburg in the coined money of the United States. When that value is ascertained, a further question arises. The claimants contend that the amount due the seamen in dollars, computed at that value, must be paid in United States currency, or legal tender notes; while the petitioners claim that they are entitled to be paid the amount in gold, or, if paid in United States currency, or legal tender notes, to be paid so much as will purchase an amount in gold equal to the amount

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in dollars found to be due to them. The ground of this claim of the petitioners is, that the contract of the seamen was made in Hamburg, for service on board of a Hamburg vessel, and that their wages are made payable in Hamburg currency. It is difficult, perhaps, to reconcile some of the decisions which have been made on this subject. The case of *Councer v. The Steam Tug Griffin* (5 *Am. Law Register, New Series*, 45), decided by Judge Hall in the District Court for the Northern District of New York, and affirmed by the Circuit Court on appeal, and the case of *The Ship Rochambeau* (26 *Boston Law Reporter*, 564), would seem to sustain the views of the petitioners. But the practice of this court has been to the contrary, even in cases of foreign seamen shipped abroad on foreign vessels under a contract in which the rate of wages was expressed in a foreign currency. (*The Isis*, before *Judge Betts*, November, 1864; *The Tweed*, before *Judge Benedict*, February, 1866.) And I am satisfied that the weight of authority, both on principle and by precedent, is in favor of the view which has prevailed in this court. (*Metropolitan Bank v. Van Dyck*, 27 *N. Y. Rep.* 400; *Wilson v. Morgan*, 30 *Howard's Pr. Rep.* 386; *Swanson v. Cooke*, 45 *Barb. S. C. R.* 574; *Kempton v. Bronson*, *Id.* 618.) When the amounts due to the petitioners in coined money of the United States are ascertained, according to the evidence which shall be given as to the commercial value of the mark courant of Hamburg in the coined money of the United States, they will be entitled to a decree for the payment of those amounts in United States currency, or legal tender notes, dollar for dollar, without any allowance for any premium on such coined money or any depreciation in the value of such currency or notes.

If the parties do not agree on the amounts due to the petitioners on the principles thus declared, there must be a reference to a commissioner.

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The Sailor Prince and her Freight Money.

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JUNE, 1867.

## THE SAILOR PRINCE AND HER FREIGHT MONEY.

## JURISDICTION.—SEAMEN'S WAGES.—STATE ATTACHMENT.—LIEN ON FREIGHT MONEY FOR WAGES.

A libel was filed by seamen to recover wages against a ship and freight money

The marshal made return to the process, that he had not attached the vessel, but had attached the freight money in the hands of parties who held it. Prior to the service of the process, suit had been commenced in a State court against the owners of the vessel, in which warrants of attachment had been issued, under which the State sheriff had seized the vessel. He held her under those attachments when the marshal came to seize her. He had also served copies of the warrants upon the parties who held the freight money, with notice that he attached it. On this state of facts, the parties submitted to this court the question, whether there had been a valid attachment of the freight by the marshal, so as to give this court jurisdiction to hear and determine the libel:

*Held*, That seamen have a paramount lien for their wages upon the freight money of the voyage, and that such lien is to be administered by a court of admiralty by the service of its attachment upon the freight money, in the hands of the parties where it is found.

That, as against a lien of this character, the principle established by the Supreme Court of the United States, in the case of *Taylor v. Carryl* (20 How. 483), ought not to be extended.

That the application of the principle of that case to an attachment issuing from a State court against a vessel, would only work delay in the enforcement of a sailor's lien for wages upon her, but that the application of it to an attachment against freight money would work the entire destruction of the lien.

That the possession of the freight money by the sheriff, constructive or otherwise was not such as the possession of the vessel in *Taylor v. Carryl*, or such as prevented the marshal from levying his process upon it, so as to give this court jurisdiction of it *in rem*.

That the jurisdiction of this court is therefore sustained.

The libel in this case was filed by John P. Murray, and fourteen other seamen, against the British ship *Sailor Prince*, and the freight money earned by her on a



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voyage from Manilla to New York, to recover their wages. The amount claimed to be due for the wages was about \$5,000, and was for the service of the seamen on board of the vessel, on the voyage on which the freight money was earned. On the filing of the libel a monition was issued, March 1st, 1867, against the vessel and the freight money. The marshal made return to that monition that he had not attached the vessel, but had served a copy of the monition personally on Kirkland & Von Sachs, and had attached \$7,100 in gold, freight money. To a subsequent alias monition issued against the vessel alone, the marshal made a return of "not found." Prior to the service of the monition by the marshal on Kirkland & Von Sachs, the claimants, Charles Lanier and J. G. Richardson, had severally commenced actions in the Supreme Court of the State of New York, against the Barned's Banking Company, Limited, an English corporation, in which actions, warrants of attachment had been issued to the sheriff of the city and county of New York, and service thereof made by him by attaching the vessel, which was still in his hands under the attachment, and by serving upon Kirkland & Von Sachs copies of the warrants of attachment, with notices that the freight money due the vessel was attached as the property of the Barned's Banking Company, Limited, in accordance with the provisions of the Code of New York in that behalf. After the service of the monition on Kirkland & Von Sachs, the freight money, by the consent of all the parties and for the greater security of the fund, and that it might be earning interest, was paid over by Kirkland & Von Sachs to Messrs. Evarts, Southmayd & Choate, attorneys for the master and the consignees of the vessel, upon the agreement that the rights of all the parties to the suit, in and to the fund, should remain unimpaired and in all respects the same as if the money had remained in the hands of Kirkland & Von Sachs, the fund to be invested in government securities. After the

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freight money was so paid to Messrs. Evarts, Southmayd & Choate, the warrants of attachment were served on them by the sheriff, and afterward the monition in this suit was served on them by the marshal. The actions in the State court were still pending. The foregoing facts were agreed upon by the counsel for the respective parties, or appeared in the papers on file in the case, and a stipulation was entered into, submitting to the court the question whether there had been a valid attachment of the freight moneys by the marshal, so as to give this court jurisdiction to hear and determine the libel. If the court should be of opinion that there had been, the several claimants were to have such time to answer to the merits as the court should order.

For libellants, *W. G. Choate.*

For claimants, *G. De F. Lord.*

BLATCHFORD, J. The lien of a seaman for his wages is, in the admiralty, prior and paramount to all other claims on the subject of the lien, and is to be first paid out of it or its proceeds. The freight money earned by the vessel on the voyage on which the seaman served is subject to such paramount lien, and is the natural fund out of which the wages are to be paid; and this lien is to be administered by the court of admiralty by the service of its attachment upon the freight money in the hands of the parties where such money is found. (*The Spartan, Ware's R.* 145; *Sheppard v. Taylor*, 5 *Peters*, 675, 711). The paramount lien, then, in this case being clear, and the court having taken the usual means to enforce that lien, and the marshal having returned that he has attached the freight money, it would seem that there could be no legal impediment to the exercise of its jurisdiction.

But it is urged by the claimants that this court can-

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not, in view of the decision made by the Supreme Court of the United States, in the case of *Taylor v. Carryl* (20 *How.* 583), assume jurisdiction of this case, or draw to itself the power, now and in this suit, of applying this freight money to the payment of the wages of these seamen. If I regarded that case as necessarily covering in its decision the principle involved in the present case, I should of course feel myself bound to follow it. But as I do not so regard it, I proceed to state my reasons for holding that, notwithstanding that case, the court has jurisdiction of the present case. The case of *Taylor v. Carryl* was decided by five judges against four, after three arguments of it before the court. That case was one where *a vessel*, while under seizure by a sheriff under process from a State court, was libelled in the admiralty by seamen on board of her for their wages. The decision of the Supreme Court in that case, as explained by Mr. Justice Nelson, in delivering the unanimous opinion of the same court in *Freeman v. Howe* (24 *How.* 450), was, that the vessel seized by the sheriff under the process from the State court, and while in the custody of that officer, could not be seized or taken from him by the process of the District Court of the United States. Again he says (page 455), that the majority of the court were of opinion that the question as to whether the State or the Federal authority should for the time prevail, depended on the question which jurisdiction had first attached, by the seizure and custody of the property under its process. Subsequently, in *Buck v. Colbath* (3 *Wallace's S. C. R.* 334, 342), Mr. Justice Miller, in delivering the unanimous opinion of the Supreme Court in that case, says that the principle of the case of *Taylor v. Carryl* was, that as between the two courts, where the property had been seized by an officer of the one court, by virtue of its process, such possession could not for the time being be interfered with by the other court. And Mr. Justice Miller in that case (page 342)

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goes on to say, that whenever the litigation in the court where the property has first been seized is ended, or the possession of such court or its officer is discharged, then other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not.

Now, in my view, the principle decided in the case of *Taylor v. Carryl* ought not to be extended as against a lien of the character of that sought to be enforced by the libellants in this case. It is at best a rule of comity. It is a relinquishment by a court of admiralty—the only court which, under the constitution and laws of the United States, has jurisdiction over the lien of seamen for their wages, or is authorized to enforce such lien—of its clear jurisdiction, in favor of a State court, which cannot enforce or displace such lien, and has no jurisdiction over it, giving to the State court the right, for the time being, to obstruct and interfere with the lien and with the remedy of the seamen. That principle or rule of comity is, according to *Taylor v. Carryl*, to be sustained, in regard to a vessel which has been seized by and is in the lawful custody of the sheriff under process from the State court, so long as it is in such custody, the Federal court being at liberty, when the litigation in the State court is ended, or when the possession of the sheriff is discharged, to take possession of the vessel and enforce against it admiralty liens. The lien of a seaman against the vessel for his wages will remain unaffected by any action of the State court in regard to the vessel. If the State court, in the suit in which it issued the process on which the vessel was seized and is held in custody, sells the vessel, the purchaser will take his title to her subject to the lien of the seaman for his wages, and the moment she passes out of the custody of the sheriff, the seaman can enforce his lien, by serving process on her on a libel in the admiralty. Now, this rule of comity, thus regarded and

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limited and administered, may, perhaps, in ordinary cases, work no other mischief than to cause unnecessary and harsh delay in the enforcement of their rights by a class of men whose paramount and superior claims are recognized in the codes of law of all commercial countries. The State court can seize and sell only the interest of the owner in the vessel over and beyond the amount of the liens of the seamen, and can convey no absolute right of property in the whole vessel to a purchaser. Legally, the lien remains, to be enforced the moment the hand of the State officer is withdrawn from the vessel. And the vessel, in theory at least, remains *in specie*, so as to be subjected to process for the enforcement of such lien. But, if the principle be extended so far as to permit the State court, as against the lien of the seamen in this case on the freight money of this vessel for their wages, to appropriate that money to the payment of the inferior claims of the creditors who have attached it by the process of the State court, the lien of the seamen on such money for their wages is gone, extinguished, put out of existence, in the face of an admiralty court, by the act of a court of common law. The court of admiralty is to abnegate functions which are conferred upon it by the constitution and laws, and to refuse to enforce a clearly admitted paramount admiralty lien, which no other court can enforce or directly destroy or supersede, because a State officer has, under process from a State court, attached a sum of money which is the subject of such lien, and is to permit the State court to apply that money to the payment of an inferior claim not founded on a lien, and thus indirectly destroy the lien practically and to all intents and purposes. I cannot believe that any such doctrine flows from the decision in *Taylor v. Carryl*, or will be sustained by the Supreme Court of the United States. So believing, I sustain the jurisdiction of this court in this case.

In speaking of process of the State court I refer solely

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to *lawful* process. When the question arises as to a State process which is *void*, it will remain to be disposed of upon considerations which may be peculiar to such a case.

I have preferred to maintain the jurisdiction of this court upon the point on which I have placed it in regard to the distinction between this case and that of *Taylor v. Carryl*, as being a broad and not a technical ground, and one comporting with the high prerogatives of a court of admiralty. I therefore do not enlarge upon another point of distinction which might, perhaps, be taken between the two cases, founded upon the fact that the sheriff in this case is not in possession of the freight money and does not appear ever to have been in possession of it, although he served his warrants of attachment upon the parties who held it, with a notice that it was attached as the property of the defendant in the warrants. The manner of attaching the money by the sheriff was, indeed, so far as the question of actual possession of the money is concerned, of as high a character as the manner of attaching it by the marshal in this case. Yet it by no means necessarily follows that the possession of the money by the sheriff, of whatever character it may be, constructive or otherwise, either absolutely under the State law of New York, or relatively when compared with the character of the possession of the money by the marshal in this case, is such a possession as was the actual possession of the vessel by the State sheriff in *Taylor v. Carryl*, or such a possession as requires this court, under a rule of comity, to refrain from interfering with it, or prevents the marshal from levying his process upon it so as to give this court jurisdiction of it *in rem*.

The view I have taken of this case proceeds upon the ground that the sheriff claims by his process to have attached the whole freight money. If he claims to have attached only the interest of the defendant in his attachments in what remains of the money over and above the

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3,109 Cases of Champagne—Alexandre de St. Marceaux & Co., Claimants.

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amount of the paramount and prior maritime liens upon it, then, of course, there can be no difficulty about the jurisdiction of this court, or about the attachment by the marshal, and the way is clear, even within the broadest application of the case of *Taylor v. Carryl*, for this court to ascertain the amount due to the seamen for their wages and pay it out of the freight money, leaving to the sheriff, under his attachments, just what he in fact attached, namely, the residuum beyond the amount of the paramount maritime liens.

An order will be entered in conformity with this decision and giving the claimants one week to answer the libel.

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JUNE, 1867.

### 3,109 CASES OF CHAMPAGNE—ALEXANDRE DE ST. MARCEAUX & CO., CLAIMANTS.

UNDervaluation.—MARKET VALUE.—PLACE OF MANUFACTURE.—INTENT TO DEFRAUD THE REVENUE.—EVIDENCE.

Where wines imported into this country, from Rheims, in France, were claimed to be forfeited to the Government for alleged fraudulent undervaluation in the invoices :

*Held*, That the "place" where the goods were procured or manufactured, as specified in the first section of the Act of March 3d, 1863, was not Rheims but France.

That the "actual market value" spoken of in the statute, is the price which the owner or producer of the goods is willing to receive for them, if they are sold in the ordinary course of trade—the price which a purchaser must pay to get them.

That if the claimants held these wines for sale at Rheims and in France, and named the prices at which they would sell them, and below which they would not sell them, then, in judgment of law, there was a market for the wines there, and the market price was the price so fixed by the claimants.

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3,109 Cases of Champagne—Alexandre de St. Marceaux & Co., Claimants.

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That it would not do to say that there was no market value for this wine, because just the special wine in these bottles, so dosed and prepared, was not sold in Rheims; but that if wine, the same in all substantial particulars as to grade, quality, and body and marketable worth, appreciation and value, as this wine was, was sold in the market at Rheims, then there was a market value for this wine.

That if the claimants, thinking that a certain letter to them contained a regular mercantile proposition, in answer fixed certain prices as the lowest cash prices, for export, for their wines in quantities, and the wines referred to were in substance the same as the wines in suit, the jury might infer that the claimants would have sold the same wines to any one at those prices, and that those prices were the market value.

That if there was such market value for the wines, and the invoices were knowingly made at a lower rate, the wines should be forfeited.

That if the invoices were made up with an intent, by false valuation, to evade or defraud the revenue, a similar result should follow.

That where probable cause is shown by the prosecution in such a case, which probable cause is to be judged of by the court, the burden is on the claimant to show his innocence.

That where invoices purporting to have been signed by one of the claimants, showing the consul's certificate attached that the subscriber was what he represented himself to be, had passed in due course of business through the hands of a deputy collector, he was competent to prove the signature upon certain invoices to be that of the claimants, though he had never seen them write.

That the appraisement in court of the goods for the purposes of bonding was not evidence of market value.

That evidence of isolated transactions in similar wines in New York was not competent evidence on the question of market value.

That letters of other wine manufacturers than the claimants, as to their own wines, were admissible as evidence on the question of market value, provided the wines were substantially of the same grade and quality as those in suit.

This was one of several actions brought in behalf of the Government to forfeit quantities of champagne wine, imported into this country by several manufacturers of it in France. The claimants in this case were de St. Marceaux & Co., of Rheims. The libel of information alleged undervaluation in the invoices as ground of forfeiture, under the fourth section of the act of May 28th, 1830 (4 *Stats. at Large*, p. 410), and the first section of the Act of March 3d, 1863 (12 *Id.* p. 737). These wines had been imported into this country by the same men for years, during which time there had been several



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examinations at the Custom House as to the correctness of the values stated in the invoices. The values stated in the invoices in question were the same as had been for several years passed at the Custom House as correct for the same articles. The Treasury Department having sent agents over to France to inquire into the wine trade, received information which led to these seizures, and similar seizures were made in New Orleans, San Francisco, and Boston. The result of the San Francisco cases will be found reported in 3 *Wallace Rep.* p. 114.

The testimony in the case was very voluminous, the case having occupied about three weeks in the trial.

The judge has stated in his charge all of it that is material to the understanding of the case.

In the course of the trial, the Government called the deputy collector at New York, before whom the oaths were taken on the importations in question, and, having first proved by him the invoices in question, and that he recognized a similarity in the signature of the claimants on all of the invoices which had come before him, but that he had never seen any of them write, offered to prove by the witness that certain invoices, not of the goods in question, were signed by these claimants. Mr. Evarts, in behalf of the Government, cited the following authorities in favor of the admission of the evidence:—(*Van Wyck v. McIntosh*, 14 *N. Y. Rep.* 442; *Doe v. Newton*, 5 *Adol. and El.* 514; 2 *Phill. on Ev.* 601, 615; *Johnson v. Davenne*, 19 *Johns.* 135; *Jackson v. Murray*, 7 *Id.* 5; *Tilford v. Knott*, 2 *Johns. Cas.* 214; 1 *Greenl. on Ev.* §§ 577, 578; *Brigham v. Peters*, 1 *Gray*, 145; *Amherst Bk. v. Root*, 2 *Met.* 532).

The court said that the case could not be distinguished from that in 2 *Metcalf*; that there was on the invoice a declaration in French, beginning: "I, the subscriber, declare that I am a member of the firm of de St. Marceaux & Co.," which went on to speak of the wines, and then there followed the certificate of the Consul that

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the invoice was produced to him by the subscriber, and that he was the person he represented himself to be; and that, as this matter came before the witness in an official capacity in the Custom House, the case came within the rule in 2 *Metcalf*, and the testimony was admissible.

The claimants, on the trial, offered in evidence the appraisalment filed in the case by appraisers appointed to appraise the goods for the purpose of bonding them, but, being objected to by the Government, it was rejected by the court.

The claimants called a witness who had purchased some of the wines of de St. Marceaux & Co. from their agent in New York at about the time in question (1864), and proposed to prove the transaction as evidence of market value, but the evidence, under the objection of the Government, was excluded by the court.

The Government offered in evidence certain letters from other manufacturers of wine tending to show the real value of their wines. The claimants objected to the evidence, and, in support of its admissibility, Mr. Evarts cited the *Clicquot* case (3 *Wallace*, 114). The court held that the letters were competent under the ruling in that case, leaving it to the jury to consider whether the wines referred to in the letters were substantially of the same quality and grade as the wines under seizure.

For the Government, *Wm. M. Evarts, G. P. Lowrey,*  
and *W. G. Choate.*

For claimants, *Webster & Craig.*

Judge BLATCHFORD charged the jury as follows :

*Gentlemen of the Jury* :—This case, as you have seen from the time occupied in the examination of witnesses and the discussion by counsel, and the principles

involved in it, is one of very great importance to the parties to the suit and to the Government. It has an important bearing also, as you have seen, in reference to other cases, the principles involved in this case applying to a large number of other cases which are upon the docket of this court. You have given a patient and attentive hearing to the evidence and to the arguments of counsel, and now you are to discharge the final and important duty of giving your verdict, if you are able to arrive at a verdict, under the charge of the court.

On the one hand, the Government claims that this case is one of a systematic undervaluation in the invoices by the manufacturers of these wines—an intentional and willful undervaluation, resorted to, as is claimed by the Government, because of the *ad valorem* system of duties which prevailed at the time in reference to champagne wines; and resorted to with full knowledge, as is claimed by the Government, of what the law required, and of what values ought to be stated in the invoices. On the other hand, it is claimed by Mr. de St. Marceaux and his firm that there was no market for these wines at Rheims, and therefore no market value for them there; that the wines are not sold at Rheims by de St. Marceaux & Co. for export; and that, there being no market value for them at the place of their manufacture, their value, for the purpose of duty, must be arrived at by taking the cost of manufacture and adding to it a sum for the manufacturer's profit. This, they claim, has been fairly done by de St. Marceaux & Co. in this case.

These are the antagonistic positions assumed. You will perceive, therefore, that if, in the course of your inquiries, you shall arrive at the conclusion that there was a market value for the wines in these 3,109 cases in the principal markets of France, and that such market value was above the invoice value stated in these three invoices, you can dismiss all question as to the cost of

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manufacture, or the cost of the wines, leaving then only one further question for consideration—whether such undervaluation by de St. Marceaux & Co. was made knowingly or not.

With this general view of the case, we approach the consideration of the particular questions involved in it. The libel of information, which is equivalent to a declaration in an ordinary action, is founded upon two statutes of the United States. One is the fourth section of the Act of May 28th, 1830, which provides, so far as it applies to the present case, that if an invoice be made up with an intent, by a false valuation, or false extension, or otherwise, to evade or defraud the revenue, the goods contained in the entry made on such invoice shall be forfeited to the United States. The other statute counted upon is the first section of the Act of March 3d, 1863, which provides, that if any owner of any merchandise shall knowingly make, or attempt to make, any entry thereof by means of any false invoice, or of any invoice which shall not contain a true statement of all the particulars required by that section, the merchandise shall be forfeited.

Now, under this last section, the first inquiry is, what are the particulars that are required to be stated in the invoice? Those particulars, so far as they apply to the present case, are the particulars required by the first section of the Act of March 3d, 1863, in reference to merchandise subject to *ad valorem* duties—that is, duties calculated at a percentage upon a written or fixed value set down by the merchant, and not a duty of so much per pound, or so much per gallon, by weight or measure.

The requirements of the statute in regard to these particulars are as follows: If the merchandise is obtained in any other manner than by purchase, the invoice must state the actual market value thereof at the time and place when and where the same was procured or manufactured. On the other hand, if the mer-

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chandise is obtained by purchase, the invoice must contain a true and full statement of the time when and the place where the same was purchased, and the actual cost thereof, and of all charges thereon. These two provisions are very plain and simple, and need to be impressed firmly upon your memory. If the merchandise is obtained in any other manner than by purchase, the invoice must state the actual market value thereof at the time and place when and where the same was procured or manufactured. But if the merchandise was obtained by purchase, then the invoice must contain a true and full statement of the time when and the place where the same was purchased, and the actual cost thereof, and of all charges thereon.

Now, in these provisions of law which I have just stated and repeated, placed side by side in the same section of the statute, you will see a policy which commends itself at once to the good sense of every citizen. That policy is this : Every *ad valorem* system of revenue must be made, as far as possible, uniform in its operation, or it will be oppressive and unjust. Merchandise, as a matter of course, will be shipped to this country by the man who manufactures it, and like merchandise will be shipped here by the man who purchases it. If the manufacturer is allowed to invoice his merchandise at what it costs him to make it, and the purchaser is compelled to invoice his goods at what it costs him to buy them, inasmuch as the latter must pay for the goods not only what it costs the manufacturer to make them, but the profit of the manufacturer in addition, an unfair discrimination is made against the purchaser, enabling the manufacturer to undersell him in the market here, and in the end surely drive him out. That is a principle which is easy to be understood, and commends itself to the good sense of every one. Hence the rule referred to, which was adopted in previous laws to this of 1863, and which finds its expression in the language I have

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cited from the Act of 1863. In the case of a purchaser of goods, the cost to him to buy the goods abroad is assumed, as a general rule, by the law, to indicate the actual market value of what he buys, it being presumed that he buys at the ordinary actual market value; and, to put the purchaser upon the same footing with the manufacturer, and to enable the government to collect substantially the same amount of duty, at the same *ad valorem* rate, on the same quantity of the same description of merchandise, whether shipped here for account of the purchaser of it, or for account of its manufacturer, the law requires the manufacturer to invoice his goods at their actual market value in the principal markets of the country where they were manufactured, no matter what they cost, no matter whether they cost more or less than such actual market value—in substance and effect, to invoice them at what the other man, the purchaser, would have to pay for them and invoice them at. That is the law, and it is perfectly plain and easy to be understood. The manufacturer cannot, under this law, take the cost to him to make the goods and add an assumed sum to that cost, and arbitrarily call that the market value which the law refers to. He may, to be sure, adopt such a course, but, if he does adopt it, he takes the risk of its being shown that the sum so fixed by him, no matter how he arrived at it, is less than the actual market value. In this case, the law presumes that de St. Marceaux and his house, the importers of these wines, knew the requirements of our law, and imposes upon them the obligation of knowing them, if they seek to avail themselves, under these requirements, of the privilege of entering merchandise which the law confers. But in this case you have something more than the presumption of law. In these invoices (and they are all alike) there is a declaration attached to each, in the French language, made by Mr. de St. Marceaux, in which he states that the values set forth in the invoices are, as the

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French express it, the "*veritable prix courant*." The translation produced makes that to be "*veritable*" (actual) "*courant*" (market) "*prix*" (value)—actual market value—veritable or true current price, to be more literal. Every one can see that "current price" and "market value" are synonymous words. We have, in common speech, the word "price-current" in our language. What is a price-current but a statement or list of current prices, which are the market values of the merchandise stated in the list? We, therefore, have Mr. de St. Marceaux declaring that the prices stated in these invoices are the veritable current prices, or actual market values of the wines. The very language of the statute is adopted in these declarations and translated into French, Mr. de St. Marceaux's own language, and the meaning could not be misunderstood by him. At the side of each of these declarations (the declaration proper being in French) is an English memorandum in these words: "Declaration where goods, wares, and merchandise have not been purchased." Now, this circumstance must have struck your observation at once, in reference to these declarations, that Mr. de St. Marceaux, after making a declaration in French (his own language, as to the meaning of which he could not be mistaken), stating that the prices in the annexed invoice are the "*veritable prix courant*," the veritable current price, the actual market value of his wines at the time and place when and where the same were procured or manufactured (because the literal translation of the French is the exact language of our statute)—that M. de St. Marceaux, after making that declaration, now comes into court, and by his witnesses and counsel claims that these wines have no market value at Rheims, and that the invoices are made up on a different basis from that market value. What that different basis may be is of no consequence. The position assumed is that there is no market value at Rheims because there is no market there. Nevertheless, notwith-

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standing this, and although you may find there was a market value in France for these wines of de St. Marceaux, still, if the prices stated by de St. Marceaux, in his invoices, according to his declarations as to the market values, were, in point of fact, as high as the actual market values which you may find to be proved by the evidence, then, of course, the defence will have been made out.

There is one expression in the first section of the Act of 1863 which requires an observation, and that is the word "*place*"—"the actual market value at the time and *place* when and where the same were procured or manufactured." The Supreme Court of the United States, in the case of Madame Clicquot's Champagne, in 3 *Wallace*, have settled the law in regard to the meaning of the word "*place*," as used in that sentence, to be, that it has a meaning as extensive as the country of the manufacturer of these wines; that it does not mean Rheims, but France, the country where the wines are procured or manufactured; and that the standard to be applied under the law is the actual market value of the wines in the principal markets of France. In that case, the district court in California had limited the meaning of the word "*place*," in the Act, to Rheims, the spot, the precise locality, where the wines were manufactured.

With these observations we are brought to consider the meaning of the words "actual market value," as used in the statute. And here also we have the authority of the Supreme Court to guide us, for, in the case of Madame Clicquot's Champagne, the district court in California, on the trial of the seizure case there of her wines, gave a very clear exposition of the meaning of the words "actual market value;" and the Supreme Court, in their opinion, say, that the charge of the learned judge in California embraced all the points in the case, and is satisfactory to the Supreme Court, and they concur in it. I have been furnished with a verbatim re-



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port of it. Now, what is the meaning of the words "actual market value?" The market value of goods is the price at which the owner of them, or the producer of them, holds them for sale—the price at which they are freely offered in the market—such prices as he is willing to receive if the goods are sold in the ordinary course of trade. This is common sense and reason. It is the popular meaning of the words, and it is their legal meaning; and we are brought around again, in this way, to the reason I before stated to you for the rule prescribed by the first section of the Act of 1863, that this actual market value, to be stated by the manufacturer of the goods, is to be, and is intended to be, and is, the price which a purchaser must pay to get the goods. That is the actual market value, and nothing else is. In the present case, the government claims that the evidence shows that de St. Marceaux's house itself holds these wines for sale at Rheims and in France, has them on sale there, offers them freely for sale there, at prices fixed by the house of de St. Marceaux & Co., and, when applied to at Rheims, voluntarily names the prices for which it is willing to sell them in the ordinary course of trade, and below which it refuses to sell them in the ordinary course of trade. If this claim on the part of the government is true—if it be a fact that de St. Marceaux does so hold these wines for sale, and offers them for sale, and names the prices for which he is willing to sell them, and below which he will not sell them—if you shall find this to be true—then there is, in judgment of law, a market for the wines in France, and a market price for them there, and a market value for them there, and such market price and market value is the price so fixed by de St. Marceaux, and so voluntarily named by de St. Marceaux.

Before going into the evidence on that subject as to whether there is or is not such a market value, I ought to make a remark upon one point. It will not do to say

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that there is no market value for these 3,109 cases at Rheims because the 3,109 cases were not themselves sold or to be sold at Rheims, but were to be sold in the United States. Nor will it do to say that there is no market value for these 3,109 cases, or for the wines in them, at Rheims, because just the special wine in the bottles in these cases, so dosed and prepared as this wine was, is not sold at Rheims. This would be trifling with the good sense of the law. You have heard the testimony on both sides, of the makers and dealers, of the brokers at Rheims, of Mr. Heidelberger, Mr. Weiland, Mr. Marshall, and others, and you will be able to judge—and it is for you exclusively to judge—whether wine, in all substantial particulars, as to grade, quality, and body and marketable worth, appreciation, and value, the same as the wine in these 3,109 cases, is or is not in the market and on sale at Rheims and in France. If it is, if there is a price which a purchaser must pay there for such wine, in order to get it in the quantities stated in these three invoices, then there is a market value for it there within the statute.

The values stated in these three invoices, per case, are as follows, all at Havre : For Carte Noir, quarts, 30 francs 50 centimes ; for pints of the same, 33 francs 50 centimes ; for Carte Blanche, quarts, 30 francs 50 centimes ; for pints of the same, 33 francs 50 centimes ; for Red Lac, pints, 34 francs 50 centimes, there being no quarts of Red Lac in the invoices ; for the Royal St. Marceaux, quarts 36 francs, and for pints of the same 39 francs. That comprehends all the descriptions of wine in these invoices. These prices you will bear in mind, and I doubt not they are impressed on your memory sufficiently.

I will now refer to some of the evidence. In the first place, there is the evidence of Mr. Marshall. Who and what Mr. Marshall is, and the general credit you will give to his testimony, in view of his examination

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and cross-examination, I shall leave entirely to you, without any comment, merely stating, as I understand it, some of the salient facts, as bearing on the case, that are testified to by him. He procured in London certain prices current, and especially a price current from Groves & Co., the agents of de St. Marceaux there, and he had certain dealings, which I shall speak of hereafter, with Groves & Co., in reference to some wines of de St. Marceaux, and he names certain prices as stated to him by Groves & Co., and by the agents in London of other houses at Rheims, as the prices of these champagne wines in France for export—the prices free on board at Havre. If you shall believe his evidence, then the prices which he states are to be taken into consideration by you as evidence of the market values in France of the wines he speaks of, whatever such wines may be, leaving only the question whether those wines are substantially the same as the wines in these 3,109 cases. Mr. Marshall says there are but three grades of champagne wine made as shipping wines, to export, by these manufacturers at Rheims, and on which they put their brand; that no matter how many different labels or brands or marks appear on them, there are but three grades of shipping wines, to export, on which they put their brand; that all the manufacturers there maintain substantially the same relations or proportions between the three grades which they make; and that they all make but three grades. He also says that a taster, and he himself, can tell by his taste, without seeing cork or label or brand, to which one of these three grades any particular wine that he may taste belongs; and that then, if that wine has a brand or label or mark upon it, so that he can become possessed of all the adventitious circumstances that give it a price or value in the market, he can tell, within four francs a case, the market value of that wine.

The bearing of this evidence, in connection with

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other evidence in the case given subsequently, is merely for the purpose of showing how many grades and qualities there are in fact of these wines, and especially of this de St. Marceaux wine, with a view of arriving at this question of actual market value; and, in that same connection, you will recollect the letter of de St. Marceaux & Co. to Leuchtenrath, in which they say to Leuchtenrath that they sell only three kinds; and they give in that letter the prices of three different grades or qualities, in that respect corresponding with the testimony of Marshall. In regard to these de St. Marceaux wines (for in what I have to say I shall confine myself solely to them) Marshall says, that the de St. Marceaux grade No. 3, or the lowest grade of the three, is worth 45 francs a case of a dozen quarts free on board at Havre; that that is the price, and that all these prices are the prices, for the last five or ten years in London, during which there has been no variation in the prices of the champagne of de St. Marceaux, or of any other brand, in London; that the lowest grade, No. 3, is 45 francs a case of a dozen quarts free on board at Havre, No. 2, 52 francs a case, and No. 1, 60 francs a case, including package and all expenses of putting on board the ship. On that same subject you will bear in mind the letter of de St. Marceaux and Co. to Leuchtenrath, in which they name three kinds and three prices: "Carte Blanche," 45 francs a case, or 3 francs 75 centimes a bottle—the same price that Marshall names for No. 3, or the lowest grade of the wine he speaks of. The second price stated by de St. Marceaux & Co. in their letter to Leuchtenrath, is for "Champagne Imperial," which is 48 francs. Marshall's second was 52 francs. The third price mentioned by de St. Marceaux & Co. in their letter to Leuchtenrath, is 60 francs, for "Royal." Marshall's price was 60 francs for No. 1, which I understand to be "Royal." These prices stated by de St. Marceaux & Co. to Leuchtenrath are prices for the wine taken in the

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cellar at Rheims, packing not included. Mr. Marshall produces five price-currents, which he obtained in London from the agents of the makers in Rheims, or parties who, he says, were the agents. You heard the testimony of Weiland in regard to the dealings of the house of Piper, Heidsieck & Co. with Newton, and of Heidelberg in regard to the dealings of de St. Marceaux & Co. with Groves & Co. I will, for the purpose of this trial, call these persons agents, as Mr. Marshall understood them to be in his dealings with them. He obtained one price-current from Groves & Co., and says that when he got that, in October, 1866—(and this testimony must be taken in connection with his other testimony, that there has been no variation within the last five or ten years, in London, in the prices of any champagne)—that when he got this price-current from Groves & Co., in October, 1866, he bought from Groves & Co. some “Royal” at 48 shillings, or 60 francs a case, less 5 per cent. discount, which was net 57 francs; that he also bought from Groves & Co., at that time, some second quality of de St. Marceaux’s wine at 36 shillings a case, or 45 francs, less 5 per cent. discount, which was net 42½ francs; that Groves told him at the time that these were the lowest prices in bond, duty not paid, in London; that Groves would have sold it to any one in the trade at that price; and that he, Marshall, was in the trade, and Groves knew it, and sold the wine to him as to one in the trade, although in fact he bought the samples, two cases of one kind, I think, and perhaps about the same quantity of the other, as samples for the United States government. The 36-shilling or 45-franc wine, “second quality Ay” of de St. Marceaux wine, which Marshall bought, is, he says, the lowest wine that de St. Marceaux puts his brand on; and that, you will recollect, corresponded with the price stated by de St. Marceaux in his letter to Leuchtenrath for the lowest of the three grades named there—that is, 45 francs for “Carte Blanche.” As to

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these prices of de St. Marceaux's wine in bond in London, without any English customs duty added, it is for you to judge whether these prices are or are not substantially the prices of the same wines free on board at Havre, that is, the lowest prices of them in France; and also whether these wines are substantially the same as the wines in the 3,109 cases in suit, and whether these prices have varied since the Spring of 1864. In this connection Marshall says, that when he bought this wine from Groves in the Fall of 1866, he told Groves he was going to buy largely for shipping, and wanted a few cases for samples, and that Groves named his lowest prices for the wines in quantities, and gave him the samples at these prices. In regard to the other price-currents which Marshall obtained in London—namely, those from the agents of Piper, Heidsieck & Co., of Jules Mumm & Co., of Charles Heidsieck & Co., and of Moët & Chandon, and to the prices stated in those price-currents—I shall not refer to them particularly, leaving you to judge, from your recollection, whether they do or do not go to show, under the law as explained to you, that there was a market value for all these wines, and especially for this de St. Marceaux wine, in France in the Spring of 1864. That is the only bearing of the evidence, and it is not to be considered in the case as applicable to any other points. There are also some price-currents of de St. Marceaux & Co. annexed to Heidelberger's deposition, two of Paris agents, and two of de St. Marceaux's house at Rheims, giving the price per bottle at Rheims, packing not included, and putting de St. Marceaux's Carte Blanche at 48 francs a case, and another kind at 60 francs a case. In regard to these price-currents, you will take into consideration the testimony of Heidelberger, who says they were mere puffing advertisements, and do not amount to anything. It is for you to judge. But, whatever these price-currents of the house of de St. Marceaux & Co. annexed to

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Heidelberger's deposition show as to the prices in fact—whether the prices are or are not puffing prices, or prices that are not reliable as prices for the wine in quantities—they undoubtedly show this, that the Carte Blanche wine named in them (and whether that wine is of the same grade and quality as the Carte Blanche in these 3,109 cases is for you to judge), and the other wines named in them, are held by de St. Marceaux & Co. on sale at Rheims, deliverable there, and to be paid for there, and in the market there, at some market value or other fixed by de St. Marceaux & Co. themselves.

Then you have the testimony of the five brokers, and of the one ex-broker, who state that they know nothing in regard to sales of these prepared wines at Rheims; but that, without doubt, the prepared wines are sold at wholesale at Rheims in transactions which are private, not being made through brokers, and therefore not public, but made through correspondence, the sales of each house being known only to itself and to the persons who purchase from it.

Then you have the letter of de St. Marceaux & Co. to Leuchtenrath, brought out by the letter from Leuchtenrath to them. Leuchtenrath's letter is dated the 4th of November, 1863. In that letter, you will recollect, he asks the house of de St. Marceaux & Co. for the lowest price of their wines for cash, for export, and for considerable orders. That was the inquiry that brought out the answer that was made, and, in due course, three days afterward, that letter was replied to. On the 7th of November, 1863, they acknowledge the receipt of his letter and reply to it. They state, in substance, that de St. Marceaux & Co. make wines of only the very first quality, and sell only three kinds—"Carte Blanche" at 3 francs 75 centimes per bottle, "Champagne Imperial" at 4 francs per bottle, and "Royal St. Marceaux" at 5 francs per bottle, taken in the cellar, packing and all other costs at the charge of the buyer; half bottles, or

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pints, of the various kinds, 50 centimes more; the price to be payable in six months, or, if cash, then 3 per cent. discount; and that, if the orders should be considerable, and should be payable in cash, they would allow 10 per cent. more as commission to the purchaser. That is the letter, and all there is in it of any importance in the case.

Now, the law, as applicable to a letter of this kind, is this: If the house of de St. Marceaux & Co. thought that this was a regular mercantile proposition, and that Leuchtenrath was a general commission merchant, and if the house of de St. Marceaux & Co. answered this letter voluntarily, and fixed certain prices as the lowest cash prices for export for the wines in considerable quantities, and if the wines, referred to by de St. Marceaux & Co. in the letter, were in substance the same as the wines in the 3,109 cases in suit, then you are at liberty to infer that de St. Marceaux & Co. would have sold the same wines to anybody at the prices named, and also to infer that there was a market value for the wines, thus made and fixed by de St. Marceaux's house itself, and that such market value is the price thus fixed. There are other letters introduced into this case from other houses, some to Leuchtenrath, and some to a man by the name of Hill, in London. The same remarks are applicable to the letters from these other houses, and to the prices named in them for the wines named, that I have applied to the wines and the prices in the price-currents obtained by Marshall in London for other wines than those of de St. Marceaux & Co.

As to this letter of de St. Marceaux & Co. to Leuchtenrath, and as to the purchase by Marshall, as samples for the United States, of their wines from Groves & Co., no possible prejudice can attach to this mode of obtaining the information sought for, or to the officers of the United States for resorting to this mode. If Groves supposed he was selling to a regular purchaser, and



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named his lowest price for considerable quantities, and if de St. Marceaux supposed he was dealing with a regular customer in the ordinary way of trade, and named his lowest prices for cash, for export, for considerable quantities, it does not detract a particle from the value of the evidence, as evidence, that in fact Marshall was buying, and Leuchtenrath was writing, to obtain evidence to be used for the United States; because the test to be applied is the state of mind of the seller to Marshall, and of the writer to Leuchtenrath. As to the prices in the letter to Leuchtenrath, deducting discount and adding packing, to get at the prices at Rheims, the government claims that the prices stated by de St. Marceaux & Co. in their letter to Leuchtenrath as the prices at Rheims, make the following net prices which the purchaser would have to pay to get these wines for export, in considerable quantities, in the market in France, and that he could not get them for less; that is, 41 francs 45 centimes for "Carte Blanche," 44 francs 6 centimes for "Champagne Imperial," and 54 francs 54 centimes for "Royal St. Marceaux." If you should find that these prices, or any other prices which you may arrive at from the evidence, were the prices which any person wishing to buy the wines would have had to pay for them in France, and that these prices were fixed by de St. Marceaux & Co., and that the wines are substantially the same as the wines in suit, and that the prices remained the same in the Spring of 1864 that they were in November, 1863, when this letter was written to Leuchtenrath, then, in judgment of law, there was a market value at Rheims and in France for the wines in suit in the Spring of 1864, and such market value was the prices so fixed by de St. Marceaux & Co. and nothing else. The government also refers to Heidelberg's testimony, which you will recollect, and upon which I shall not comment, except to refer you to it, in regard to invoices made by the house of de St. Marceaux & Co. at Rheims, to pur-

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chasers of wine there, at prices running from 3 francs 25 centimes and 3 francs 50 centimes per bottle to 5 francs per bottle. The government claims that Heidelberger testified that that wine was the same kind of wine as the "Carte Blanche" that he sends to the United States. The price of 3 francs 25 centimes a bottle would be 39 francs a dozen, 3 francs 50 centimes a bottle would be 42 francs a dozen, and 5 francs a bottle would be 60 francs a dozen, because it was not in cases, but was in bottles unpacked, and the cost of packing, which is testified to be 2 francs 16 centimes a dozen, is to be added, for the wine must be put in cases to be exported, and that expense is a portion of the dutiable value. The government claims that the testimony of Heidelberger shows the fixing by the house of de St. Marceaux & Co. itself of a market value for the wines in suit, and at a higher rate than the invoices.

Then you have the evidence on the part of the claimants in this case. You recollect the depositions of a large number of witnesses in France, the deposition of Heidelberger, the testimony of Weiland, and the depositions of the five brokers and the one ex-broker. Upon that subject I will refer to the charge of the court in the case in California, which was approved by the Supreme Court, and will read an extract from it: "On the part of the claimants, gentlemen, a large number of witnesses, most respectable, apparently, from their official positions" (witnesses like these brokers, about whom we have heard, as to their positions, qualifications, and character,) "have testified that there is no market value for this wine at Rheims. It is for you to say whether they are not totally mistaken, or, if they are not wholly mistaken, whether their mistake has not arisen from a misconception of what is the market value of wines. It is for you to say whether they mean anything more than that the manufacturers do not, at Rheims, deal in each other's wines." And I refer you to the language of one or two

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of the brokers in this case, as I recollect it, where they state that there are no brokers or commission-merchants who deal at Rheims in these wines. "The statement made by them that there is no market value for champagne at Rheims must be taken by you with the explanations and qualifications with which it is given. It must be taken in connection with the rest of their evidence, showing in what sense they mean to say that there is no market value for these wines in the champagne district. It must be taken also in connection with the testimony offered by the United States to show that there is a market value for these wines; that is to say, that these wines are held at and can be obtained by anybody for certain determinate rates, below which they cannot be obtained."

Now, gentlemen, if, on all the testimony, you shall find that there was an actual market value in France for the wines in suit, then it was the duty of de St. Marceaux's house to put that value in the invoices. And the next question for inquiry is, have they done so? If you shall find that there was such actual market value, you will probably not have much difficulty in determining the question as to whether the invoice value is above or below such market value. If you shall find that it is below, then you must determine whether the undervaluation was intentional and done knowingly, or whether it was done unintentionally and ignorantly. If, in making out the invoices and asserting in the declarations annexed and required by the statute, that the prices stated in the invoices were the actual market value, the "*veritable prix courant*" of the wines in Rheims or in France, de St. Marceaux, who made the declarations in the invoices, knew better, then he did it knowingly; and if you believe that he knew that the invoices did not state as high a value as the actual market value, then the wines must be forfeited.

A good deal has been said in this case by counsel in

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regard to the manner and time and circumstances under which these wines were seized, and the persons by whom they were seized. That is something with which neither you nor the court have anything to do in this case. The government has adopted the seizure, and is in court upholding and maintaining it. It is of no consequence how it was made, or when it was made, or from what motive it was made, if the facts and the law require the forfeiture of the goods. There is but one other rule of law to which I think it necessary to call your attention, and that is this: In a case like this, where probable cause is shown for the prosecution, and which probable cause is to be judged of by the court, the burden of proof is thrown on the claimant to dispel the suspicion and explain the circumstances which seem to render it probable that there has been a knowing undervaluation. The government having in this case, in the first instance, as decided by the court, established probable cause, it is for the claimants to show their innocence, and dispel and clear up the suspicion which the government in the beginning raised against them; and, under this rule, it is for you to say whether the claimants have made out their defence, and have shown that these wines were invoiced at their actual market value in the principal markets of France at the time they were manufactured. If they have not shown that, you will find for the United States; and if they have shown that, you will find for the claimants.

I have said everything that I deem it necessary to say in regard to the facts or the law of this case, and all propositions made on either side to the court to charge the jury, which are not embraced or covered affirmatively or negatively by the charge as given, will be considered as refused.

You will give to this case, gentlemen, I doubt not, a patient and careful consideration, with an earnest desire

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to arrive at a just conclusion, and I commit it to you entirely satisfied that you will do so.

*Mr. Webster.*—If the court please, in the last proposition but one stated by the court there was an omission in regard to the statutory knowledge or intent. I think the general direction of this part of your honor's charge on that point was, that if the jury found that the goods were undervalued, they were to find for the government. There was no condition annexed in regard to guilty knowledge or intent.

*Mr. Evarts.*—When your honor was passing upon the question of probable cause and the burden of proof, you did not repeat, my learned friend thinks, the condition of knowledge in which the undervaluation was made.

The COURT.—Of course, gentlemen, you will understand that even if you find that these goods were undervalued—that is, if they were valued in the invoices at less than the actual market value—you still must find, in order to forfeit the goods, that this was done knowingly by the house of de St. Marceaux & Co.

*Mr. Webster.*—There are two counts in the information, one under the fourth section of the Act of 1830, and one under the first section of the Act of 1863. The fourth section of the Act of 1830 refers to "intent" to evade the duty.

The COURT.—Of course, from what I have said, you will understand that the word "knowingly" occurs in the Statute of 1863, and applies to that statute, and that under the count founded upon that statute you must find that the undervaluation was made knowingly by de St. Marceaux & Co. There is a count under the fourth section of the Act of 1830. Under that section you must find, in order to find against the claimants and in favor of the government, that the invoice was made up with an intent, by false valuation or extension or otherwise, to evade or defraud the revenue; and under that section,

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unless you find that, the goods cannot be forfeited. But you can find for the government under either statute, or under either count of the libel. You may find under the Law of 1830, or under the Law of 1863. If you find against the claimants under either one, the goods are to be forfeited.

The jury failed to agree upon a verdict, and the case was compromised without a second trial.

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JULY, 1867.

IN THE MATTER OF CHARLES A. MORFORD,  
A VOLUNTARY BANKRUPT.

PRACTICE IN BANKRUPTCY.—AMENDMENT.—POWER OF REGISTER.

Where a petitioner in bankruptcy applied to the register for leave to amend the schedules attached to his petition, which the register refused, and certified to the court the questions: (1.) Whether registers had power to allow amendments; and (2.) Whether, if they had such power, the amendments should be made before the register, and certified copies filed with the clerk, or *vice versa*:

*Held*, That under § 4 of the Bankrupt Act, and rules 5 and 7 of the General Orders in Bankruptcy adopted by the Supreme Court, the court has the power to allow such amendments, and, that for the purpose of allowing such amendments, where they are uncontested, the register is the court, and has power to allow them on a direct application to him.

That the co-ordinate power of allowing them rests with the judge.

That the original amendments permitted to be made should be filed with the clerk.

That, in making them, General Orders No. 14 and No. 33 should be observed.

That, when they are filed, the registers will act on them under General Order No. 7 and rule No. 4 of this Court in Bankruptcy.

In this case the petitioner applied to the register

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for leave to amend the schedules to his petition, and the register denied the application, upon the ground and for the reason that the power of ordering amendments to the schedules rested entirely with the court, and that only the judge could allow such amendments. The register certified such question to the court, and stated the points on which the opinion of the court was desired to be these :

(1.) Whether registers, to whom causes in bankruptcy are referred by order of the court, may allow amendments to be made to schedules filed with them.

(2.) If the registers can allow such amendments, whether such amendments can be made directly before the registers, and certified copies thereof be filed with the clerk ; or whether the original amendments permitted to be made should be filed with the clerk, and the registers thereafter receive copies from the clerk, as in the case of the original petition and schedules.

**BLATCHFORD, J.** By section four of the Bankrupt Act it is provided, that every register duly appointed and qualified shall have power, and it shall be his duty, to sit in chambers and despatch there such part of the administrative business of the court, and such uncontested matters, as shall be defined in general rules and orders, or as the District Judge shall in any particular matter direct. By rule 5 of the General Orders in Bankruptcy, framed by the Justices of the Supreme Court of the United States in pursuance of the tenth section of the Bankrupt Act, it is provided that the registers may conduct proceedings in relation to the following matters, when uncontested, namely (among others), ordering amendments of any proceedings. Among the amendments so referred to is unquestionably the amendment of a voluntary bankrupt's schedule of creditors and property, for, by section twenty-six of the Act it is provided, that a bankrupt shall be at liberty, from time to time, upon oath, to

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amend and correct his schedule of creditors and property, so that the same shall conform to the facts; and, by rule 7 of the General Orders in Bankruptcy, before referred to, it is provided, that the court may allow amendments to be made in the bankrupt's petition and schedules, upon the application of the petitioner, upon proper cause shown, at any time prior to the discharge of the bankrupt. These provisions apply as well to a case where the petitioner has not yet been adjudged a bankrupt, as to a case where he has. For the purpose of allowing such amendments, when they are uncontested, the register is the court, and has power to allow them on a direct application to him. Of course the coordinate power of allowing them in like cases also exists in the judge.

The original amendments permitted to be made should be filed with the clerk, and, in making them, rules 14 and 33 of the General Orders in Bankruptcy, before referred to, should be observed. When they are so filed, the register will act on them, in conformity with rule 7 of said General Orders in Bankruptcy and rule 4 of the rules of this Court in Bankruptcy.

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JULY, 1867.

IN THE MATTER OF JULIUS A. BOYLAN, A  
VOLUNTARY BANKRUPT.

PRACTICE IN BANKRUPTCY.—PARTNERSHIP.—SEPARATE PETITIONS.

A firm composed of three persons did business in Cincinnati, Ohio, till April 18th, 1861, when it was dissolved. In June, 1867, one of the partners filed his petition in this court, praying only that he individually might be adjudged



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a bankrupt, and was adjudged a bankrupt. Thereupon, the two other partners applied by petition, stating that there were no debts of the other partner but copartnership debts, that they themselves resided in Ohio, and owed no debts but those of the partnership, that there were no partnership assets, and that their liabilities were exactly the same as those of the other partner, and praying leave to join in his application, and leave to file their petitions in this court, and that all proceedings on the first petition be stayed till their petitions should be disposed of:

*Held*, That the thirty-sixth section of the Bankrupt Act applies only to a case where two or more persons who are partners in trade are adjudged bankrupt, and that here only one partner had been adjudged bankrupt.

That the petitioners could present a petition praying that the partners which composed that firm be adjudged bankrupt, to the court which, under section eleven of the Act, had jurisdiction of such a petition, and, if the other partner should refuse to join in it, the eighteenth General Order would apply.

That the prayer of the petition must be denied.

**BLATCHFORD, J.** In this case the petition of Daniel K. Harvey and Thomas H. Boylan shows, that they were copartners with Julius A. Boylan, and carried on business under the firm name of Boylan & Co., at Cincinnati, Ohio, until April 18th, 1861, when the copartnership was dissolved; that Julius A. Boylan, on the 27th of June, 1867, filed his petition in this court for his discharge in bankruptcy, and was adjudged a bankrupt on the 28th of June, 1867; that he has no individual assets except such as are exempt, nor are there any copartnership assets of any kind; that all the indebtedness of Julius A. Boylan is the copartnership debts, as appears by his petition and schedules; that Harvey and Thomas H. Boylan reside in Ohio; that they have no debts except the copartnership debts of Boylan & Co., and their liabilities are for exactly the same amounts and to the same individuals as those of Julius A. Boylan; that they are about to take the benefit of the Bankruptcy Act, but cannot do so without incurring a large and unnecessary expense if compelled each, individually, to proceed under the Act; that the creditors of the firm are one hundred and eighteen in number; and that they would be put to great expense and trouble if compelled to attend the

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meetings of the creditors of the firm in two different parts of the country as far apart as New York city and Cincinnati, Ohio. The petitioners pray that leave be given them to join in the application of Julius A. Boylan for their discharge in bankruptcy under the Act, and that they have leave to file their petitions under the Act in this court, and that all proceedings under such petitions be had in this district, and that all proceedings on the part of Julius A. Boylan be stayed until the final disposition of such petitions.

In support of the prayer of this petition reference is made to the thirty-sixth section of the Bankruptcy Act, which provides "that where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this Act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted;" and that, "if such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case." It is urged that, under these provisions, all the partners of the firm of Boylan & Co., of which Julius A. Boylan was one, can come into this court, without regard to their place of residence or doing business, and ask for their discharges, provided Julius A. Boylan resides or does business in this district and first files his petition here.

The difficulty in the view thus urged is, that Julius A. Boylan has petitioned merely as an individual for his individual discharge, and has been individually adjudged a bankrupt. The thirty-sixth section of the Act applies only to a case where two or more persons who are partners in trade are adjudged bankrupt. It would apply to the present case, if, on the petition of Julius A. Boylan,

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two or more members of the firm of Boylan & Co. had been adjudged bankrupt. The clause of the thirty-sixth section which provides, that where "*such* copartners reside in different districts, that court in which *the petition* is first filed shall retain exclusive jurisdiction over the case," means, that where two or more petitions are filed in different districts, praying that two or more persons who are partners in trade be adjudged bankrupt, and such partners reside in different districts, the court in which the first in order of time of such petitions is filed shall have exclusive jurisdiction to do what the thirty-sixth section allows and requires to be done in a case where two or more persons who are partners in trade are adjudged bankrupt. That clause has no application to the present case. There has not been any petition yet presented to any court, so far as appears, praying that the partners composing the firm of Boylan & Co. be adjudged bankrupt. Such a petition can be presented by Harvey and Thomas H. Boylan to the court which, under the eleventh section of the Act, has jurisdiction of such a petition. If such a petition be presented by them, and Julius A. Boylan refuses to join in it, the 18th rule of the "General Orders in Bankruptcy" will apply to the case.

These views are strengthened by the language of the 16th rule of the "General Orders in Bankruptcy," which provides as follows: "In case two or more petitions for adjudication of bankruptcy shall be filed in different districts by different members of the same copartnership for an adjudication of the bankruptcy of said copartnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and, if such petitions shall be filed in the same district, action shall be first had upon the one first filed."

The prayer of the petition is denied.

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In the Matter of Jesse H. Robinson, a Voluntary Bankrupt.

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JULY, 1867.

IN THE MATTER OF JESSE H. ROBINSON, A  
VOLUNTARY BANKRUPT.

BANKRUPTCY PRACTICE.—ADVERTISING.—REGISTER'S DISCRETION.

Where the register, to whom a petition had been referred, designated as the newspapers in which the notice to creditors should be published, two papers in New York city and two in other States, and the bankrupt objected to the designation of the papers out of New York city, and the register certified that, in his opinion, such publication was necessary to protect the creditors in their rights:

*Held*, That the register has power in such a case to designate newspapers, in addition to those selected, under rule 5 of this Court, from those designated in rule 21, but cannot substitute other newspapers for those which he is required by rule 5 to select.

That, although, in this case, the majority in amount of the creditors resided in New York city, yet the majority in number resided elsewhere, and that the exercise by the register of his power to make such designation was proper.

BLATCHFORD, J. In this case the register has designated, in the warrant, as the newspapers in which publication of notice to creditors shall be made, two newspapers in the city of New York, one in Toledo, Ohio, and one in San Francisco, California. The register claims to have made these designations in accordance with the provisions of section eleven of the Bankruptcy Act, of rule 5 of the "General Orders in Bankruptcy," and of rules 5 and 21 of this Court in Bankruptcy. He also reports that the designation of the newspapers in Toledo and San Francisco is rendered proper by the fact that a great majority in number of the creditors of the bankrupt reside in California, Ohio, Indiana, and other places out of the city of New York, where the bankrupt is stated in his petition to reside. The bankrupt objects to so much of the designation as specifies the newspapers out of the

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city of New York, and the warrant has been withheld by the register to await the decision of the court on the point, which has been certified to the court. The objection taken is, that the power of the register in regard to the designation of the newspapers is only that which is given to him by rule 5 of the "General Orders in Bankruptcy;" that such power as is there given is the power of "*directing, unless otherwise ordered by the court, the newspapers in which the notices shall be published by the messenger;*" that the register has been divested of that power by rules 5 and 21 of this Court in Bankruptcy, rule 5 providing that the warrant "shall specify two, if there be two, and, if not, then one, of the newspapers named in rule 21, published in the county, &c., the selection of such newspapers to be made by the register, &c.," and rule 21 declaring that "the following newspapers are designated as those in which all publications required by the Act, or the 'General Orders in Bankruptcy,' or these rules, may be made," and specifying thereafter only newspapers published in this district. It is claimed that, under rule 21, all publications must be made in the newspapers therein designated, and cannot be made in any others, either as additional or substituted.

In case it be held that the register has such power, the decision of the court is asked as to the cases or class of cases in which, and the grounds upon which, such power may be exercised. As bearing on that subject, it is stated, that in the present case it appears, by the schedules to the petition, that a majority in value of the creditors reside in the city of New York. It is also urged that the publication of notices under the warrant in other newspapers than those designated in rule 21, in lieu of or in addition to the same, would work peculiar hardship to the petitioner in the vast majority of voluntary applications.

The register certifies that, in his opinion, the publica-

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tion in the foreign newspapers is necessary in this case in order to protect the creditors in their rights, the theory being that the newspaper publication is for the benefit of the creditors ; that the Toledo and San Francisco papers would be more likely to inform the foreign residents than the New York papers would ; that the selection of foreign newspapers ought to be left to the wise discretion of the register, as he has clear information in each case of the residence of the creditors from the schedules ; and that while the debtor might object to the expense of publication, yet he seeks relief from his creditors in an action of which they should be notified with reasonable certainty.

I think that the register has power, in a case like the present one, to designate foreign newspapers in addition to those selected by him, under rule 5 of this Court, from among the newspapers named in rule 21 of this Court. He must in all cases observe rule 5, and select from the newspapers named in rule 21. He cannot *substitute* other newspapers, whether published in or out of this district, for those which he is required by rule 5 to select. But in a proper case he may, in the exercise of a wise discretion, add other newspapers, *not published in this district*, to the newspapers which he selects under rule 5, although he cannot add newspapers published in this district. Rule 5 requires publication to be made in certain newspapers within this district, but was not intended to prevent publication being made in addition, in proper cases, in other newspapers out of this district. So, also, rule 21 only specifies the newspapers from which a selection is to be made when newspapers in this district are to be selected, and was not intended to affect the selection of newspapers out of this district, in addition to the others, in proper cases. Such selection of additional newspapers out of this district must be left to the registers, and is left to them by rule 5 of the "General Orders in Bankruptcy." They must exercise a proper

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judicial discretion on the subject. It is impossible to specify in advance the cases, or classes of cases, or the grounds for the exercise of the power.

In the present case, it appears that, although a majority in value of the creditors reside within the city of New York, yet a great majority in number of the creditors reside without the city of New York. By section thirteen of the Act, the choice of an assignee is to be made by "the greater part in value and in number of the creditors who have proved their debts." It is, therefore, as important for twenty small creditors in Ohio and California to be notified of the first meeting of creditors as it is for one large creditor in New York, although the debt due to the latter exceeds the aggregate of the debts due to the former. Nothing is shown to throw a doubt on the propriety of the exercise by the register in this case of the power he possesses, or on the wisdom of selecting the particular foreign newspapers which he has selected.

The register suggests, in his certificate, that he thinks that in this case, and in many cases where there are few or no creditors resident in New York, publication in one New York paper would be sufficient. I think it will be better to adhere to rule 5 in all cases. A non-resident creditor who knows where his debtor resides is likely, in view of the Act, to have the newspapers published in the place of residence of his debtor scrutinized, to see if any notice of the debtor's bankruptcy be published, and the extent of the publication at the place of residence of the debtor ought not to be abridged.

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In the Matter of Adolph Baum, a Bankrupt.

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JULY, 1867.

IN THE MATTER OF ADOLPH BAUM, A  
BANKRUPT.

## PRACTICE.—TIME TO FILE SPECIFICATIONS OF OPPOSITION.—EXAMINATION OF BANKRUPT.

A creditor who has proved his claim may, at any time thereafter, and before the expiration of the time limited by rule 24 of the General Orders in Bankruptcy, file specifications of the grounds of his opposition to a bankrupt's discharge.

That rule is enabling and not prohibitory.

The filing of such specifications is not a necessary prerequisite to the making of an order, under § 26 of the Bankruptcy Act, for the examination of the bankrupt, or of other persons.

In this case a register in bankruptcy certified to the court that a creditor had given notice of his intention to oppose the discharge of the bankrupt, and had handed in a list of objections to the discharge; that the bankrupt opposed the reception of the objections at that stage of the proceedings, it being the first meeting of creditors specially for the proof of debts and the choice of an assignee; and that the opinion of the court was desired on the question as to whether the objections could now be received. The register referred to section 31 of the Bankruptcy Act, which provides that any creditor opposing the discharge of a bankrupt may file a specification in writing of the grounds of his opposition, and the court may, in its discretion, order any question of fact so presented to be tried at a stated session of the District Court. The register stated that in this case the petitioner represented no assets whatever in his schedule; that the creditor was not satisfied with this, and had declared his



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intention of applying, as soon as the appointment of the assignee, which had been made, was approved, for an order to examine the bankrupt and other persons, under section 26, with a view to finding assets, as well as proving the specific charges of fraud which the creditor had specified in the paper filed by him. The register stated that this seemed to suggest the following questions: (1) When shall a creditor so file his objections? (2) When the objections are so filed, may the register make an order that the bankrupt and others should appear to be examined? (3) Is it competent for the creditor to examine the bankrupt and others *ad libitum* to find property, as well as to establish his specifications of fraud and other objections to the discharge? The register observed that if the provisions of the Act would permit, it would seem to be well if something of this kind could be done at an early period of the proceedings, first, to quiet all groundless fears, and second, to ascertain what facts and what issues it was worth while to bring before the court for trial; that such a proceeding would be quite in analogy with the provisions of section 391 of the Code of Procedure of the State of New York, which had at times a very healthy operation; that if, after such examination, the register could certify to the court the precise issues that existed between the respective parties, and which the court must try, very much labor and vexation would be spared to the court, which really has less conveniences for getting at such issues than the register, before whom the testimony is taken, and who fully knows the whole case; that the provisions of rule 24 of the "General Orders in Bankruptcy," to the effect that "a creditor opposing the application of a bankrupt for discharge shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file his specification of the grounds in opposition in writing within ten days thereafter, unless the time shall be enlarged by order

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of the District Court in the case, and the court shall thereupon make an order as to the entry of said case for trial on the docket of the District Court, and the time within which the same shall be heard and decided," are not in antagonism with this view; that rule 24 contains nothing prohibitory, and may be fully operative on those who have not theretofore appeared; that the creditors who have filed objections and examined the bankrupt and other witnesses, and got out all the facts which they desire, may well come into court at the time prescribed in rule 24, enter an appearance, and file such specifications as they on the whole have concluded they will be able to sustain, and thereupon proceed as specified in rule 24; that he could see no objection to any creditor who may see fit to file objections with the register, or perhaps without that, proceeding at once to examine the bankrupt and other witnesses, and thereby fully preparing himself to take the steps prescribed in rule 24, and that the 26th section of the Act would fail in having some of its specifications carried out if an opposite view were taken, as power is there given to the court "at all times" to require the bankrupt to attend and be examined.

BLATCHFORD, J. I fully concur in these general views of the register. A creditor who has proved his debt may file at any time the specification in writing of the grounds of his opposition to the discharge of the bankrupt, referred to in section 31 of the Act. Rule 24 of the "General Orders in Bankruptcy" is enabling, and not prohibitory. A creditor who does not file his specification by the time specified in rule 24 will lose his opportunity of doing so. But he has a right to file such specification at any time after he has proved his debt, and before the expiration of the time limited by rule 24. The filing of such specification is not, however, a necessary prerequisite to the making of an order, under

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section 26 of the Act, that the bankrupt or other persons attend and be examined as to the matters specified in that section. Such order may be made, and such examinations may be had, on the application of the assignee, or of any creditor who has proved his debt, or on the suggestion of the register himself, and without any application, and without the previous filing of any specification under section 31 of the Act. The bankrupt and all other persons are subject to examination at all times, at the instance of the assignee or of any creditor who has proved his debt, or of the court, or of the register, in regard to any of the matters specified in section 26.

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JULY, 1867.

IN THE MATTER OF JAMES MACINTIRE,  
A BANKRUPT.

EXAMINATION OF BANKRUPT.—FEES OF REGISTER.

Where, at the first meeting of a bankrupt's creditors, notice was given on behalf of a creditor, of an application to be made next day for an order for the examination of the petitioner, and the application was made pursuant to notice, whereupon the register proposed to grant the order on payment by the creditor of one dollar as his fee, and on request certified the question to the court whether the creditor must pay any and what fees :

*Held*, That the proposed fee to the register is not provided for by the Act, nor by the General Orders in Bankruptcy, unless it is covered by the words in rule 30, "For every order made where notice is required to be given, &c."

That these words apply to cases where previous notice is required to be given to an adverse party of the application for the order, before the order can be made.

That, under the 26th section of the Act, no notice is required to be given of an application to a register by a creditor for the examination of a bankrupt.

That the examination is not a "*meeting*" under § 47 of the Act, that word in the Act always meaning a meeting of creditors.

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In the Matter of James Macintire, a Bankrupt.

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That the register is not entitled to the fee of one dollar for making the order in question, nor to any fee for that service.

That where a creditor applies for an order for the examination of a bankrupt; he must pay to the register the fees allowed by law for taking the bankrupt's depositions, both on the direct and cross-examination, and the register is not obliged to look in the first instance to the bankrupt, or to the fifty dollars deposited, or to the estate.

In this case a register in bankruptcy certified that the first meeting of creditors was held July 11th, at which notice was given of an application next day for an order to examine the petitioner on behalf of a creditor, and the meeting was duly adjourned to July 12th. On that day, the petitioner attending, a creditor who had filed proof of his claim applied for an order, in pursuance of said notice, for the examination of the petitioner on behalf of the creditor at that time, the petitioner not objecting to the time, but insisting that the creditor must pay the register's fees for the order. The creditor refused to pay any fees, insisting that they must be paid out of the deposit of fifty dollars made by the petitioner with the clerk. The register proposed to grant the order on payment by the creditor of one dollar as the proper fee. At the request of the creditor the register certified the question for the decision of the court.

The register, in his certificate, referred to that portion of the fourth section of the Bankruptcy Act, which provides that the fees of the registers, as established by the Act, and by the general rules and orders required to be framed under it, shall be paid to them by the parties for whom the services may be rendered in the course of proceedings authorized by the Act. He also referred to that part of rule 29 of the "General Orders in Bankruptcy" which provides that the fees of the register shall be paid or secured in all cases, before he shall be compelled to perform the duties required of him by the parties requiring such service. He also stated it

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to be his opinion that the granting of the order for the examination of the bankrupt having being required by the creditor and not by the bankrupt, the former and not the latter ought to pay the fees for the order.

On the part of the creditor it was claimed, that such fees as are connected with the personal examination of the bankrupt are governed by the forty-seventh section of the Act; that that section says that such fees shall be paid out of the estate, and have priority over all other claims; that the court may, under rule 29 of the "General Orders in Bankruptcy," exercise its discretion as to the payment of the whole or a part of the fees out of the fund in court; but that, without such direction from the court, the register must look to the fund in court for his fees in such a case as the present.

BLATCHFORD, J. The fee of one dollar proposed to be charged by the register in this case, for making the order for the examination of the bankrupt, is not provided for by the Act, and is not at all provided for unless it is covered by the following provision of rule 30 of the "General Orders in Bankruptcy," under the head of fees to the register: "For every order made where notice is required to be given, and for certifying copy of the same to the clerk, one dollar." This provision allows a fee of one dollar for making an order and for certifying a copy of the same to the clerk, in a case where previous notice is required to be given to an adverse party of the application for the making of the order, before the order can be made. That this is the meaning of that provision of rule 30 of the "General Orders" is shown by the language of rule 8 of the "General Orders." In the present case no notice was required to be given to any party of the application for the order for the examination of the bankrupt, before the order could be made. By the twenty-sixth section of the Act it is provided, that the court may at all times require the

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bankrupt, upon reasonable notice, to attend and submit to an examination on oath upon all matters relating to the disposal or condition of his property, &c. An order requiring the bankrupt so to attend and be examined, and service of such order on him a reasonable length of time previously, are necessary; and the form of such order is prescribed by Form No. 45 of the forms specified in the schedules annexed to the "General Orders in Bankruptcy." But no previous notice is required to be given to any person of the application to the register by the creditor for the making of the order. It is to be made *ex parte*, on the application of the creditor. It may also, under section twenty-six of the Act, be made by the register *ex parte*, on the application of the assignee, or by the register on his own suggestion, without any application. The register was, therefore, not entitled to charge any fee for making the order in this case. There are many specific services which must be rendered by the registers, and for which no specific fee is provided either by the Act or the "General Orders in Bankruptcy." Their compensation for such services is covered by the specific fees which are enumerated in the Act and the "General Orders." Thus, the register receives two dollars for issuing a warrant, but no specific fee is provided for the adjudication of bankruptcy, Form No. 5, which the register must make before he can issue the warrant. He receives compensation for making the adjudication, in the fee of two dollars which he receives for issuing the warrant. That fee of two dollars is a fee for doing everything (a fee for which is not otherwise specially provided) which results in the issuing of the warrant; and no specific fee is provided for the service of examining the bankrupt's petition and schedules, when such examination results in the withholding of the adjudication of bankruptcy. So, also, the fee of three dollars to the register for an order for a dividend covers all his services, not otherwise provided for, which result

in the making of the order for the dividend; and the fee of two dollars to the register for every discharge, when there is no opposition, covers all his services, not otherwise provided for, which result in the granting of the discharge. The making of the order in this case for the examination of the bankrupt, not having any fee specially attached to it, must be considered as compensated by some one or more of the fees which are enumerated.

The fee of one dollar for the order cannot be considered as authorized by the provision of the forty-seventh section, which gives a fee of one dollar for "every application for any meeting in any matter" under the Act. The word "meeting," wherever used in the forty-seventh section and elsewhere in the Act, means a meeting of creditors such as is spoken of in the twelfth, twenty-seventh, and twenty-eighth sections. The application by the creditor for the order for the examination of the bankrupt cannot be regarded as an application for a meeting of creditors.

As the register was bound to make the order asked for without requiring the payment by the creditor, or any other person, of any specific fee for such order, this decision might properly go no farther than to dispose of that point. But, in view of the positions urged by the counsel for the creditor, it is deemed proper to lay down the following proposition, which is applicable to this case, namely—that where a creditor applies, under section twenty-six of the Act, for an order for the examination of the bankrupt, the creditor must pay to the register the fees allowed by law for taking the deposition of the bankrupt, not only for his direct examination, but for his cross-examination, if any, and the register is not required to look in the first instance for such fees to the bankrupt, or to the fifty dollars deposited by him, or to the bankrupt's estate.

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The Steamer Electra.

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JULY, 1867.

## THE STEAMER ELECTRA.

**COLLISION BETWEEN STEAMER AND FERRYBOAT IN THE EAST RIVER.—  
SPEED.—BOTH VESSELS IN FAULT.—FAILURE TO CARRY A WHISTLE.**

Where a large steamer, having come through the main ship channel of Hell Gate, bound to New York, at the rate of twelve miles an hour, as she approached the slip of the Astoria ferry, saw a ferryboat in and just leaving the slip on the New York side, and blew two whistles, but the ferryboat came out of her slip so far that the steamer, not being able to pass ahead of her, blew one whistle and tried to go astern, but the ferryboat then stopped and backed and was struck amidships on the port side and sunk, the evidence being very conflicting and unsatisfactory :

*Held*, That the ferryboat was in fault in not holding back for the steamer to pass ahead of her.

That the steamer was in fault in not slackening her speed as she rounded a point just above the ferry.

That the ferryboat was guilty of gross negligence in omitting to carry a whistle, though that circumstance seems to have had no influence on the movements of either vessel.

This was a libel filed by Anthony W. Winans, owner of the steam ferryboat Astoria, to recover the damages caused by her being sunk by a collision with the Electra, the ferryboat being on her trip from her slip at Eighty-sixth street, New York, to Astoria, and the Electra being bound to New York. The collision took place about nine o'clock in the morning. The tide was flood, running to the eastward, and there was a good deal of floating ice in the river.

It was claimed on behalf of the Astoria that she was some way out in the river when she saw the Electra coming around Horn's Hook, a point on the New York shore at the foot of Eighty-ninth street; that the Electra blew two whistles indicating that she was going ahead of



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The Steamer *Electra*.

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the *Astoria*, which thereupon backed, when the *Electra* blew one whistle and undertook to go under her stern, and though her engine was at once started ahead the *Electra* struck her amidships, sinking her in a few moments.

On the part of the *Electra* it was claimed that as she came round Horn's Hook the ferryboat was seen in her slip, whereupon two whistles were blown to tell her to stay there till the steamer had got by; that instead of so doing she came out and kept on until it was clear that the steamer could not get by ahead; that the steamer then blew one whistle to tell her to keep on and tried to go under her stern, but the ferryboat stopped and backed right in the track of the steamer.

There was great conflict in the testimony as to the position and movements of the vessels.

The ferryboat had no whistle. The speed of the steamer was about twelve miles an hour as she came by Horn's Hook.

For libellant, *Beebe, Dean & Donohue*.

For claimants, *Benedict, Tracy & Benedict*.

SHIPMAN, J. This suit is instituted to recover damages for a collision which occurred in the East River, near the west shore, and just below Horn's Hook, on the morning of the 16th of February, 1865, between the *Electra* and the steam ferryboat *Astoria*, owned by the libellant. The ferryboat was on her regular route from near the foot of Eighty-sixth street, New York, to *Astoria*, Long Island. The *Electra* was bound from Providence, R. I., to New York.

The *Electra* came down in the west or main ship channel, and as she came out past Horn's Hook she sounded two whistles, which indicated that she intended to cross the *Astoria's* bow. There is a conflict of evi-

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The Steamer Electra.

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dence as to where the Astoria was when these two whistles were sounded, her witnesses insisting that she was three hundred feet out in the stream and above her slip; those of the Electra that she was in or very near her slip.

It is difficult to determine which is right on this point. The pilot of the Astoria says that he was three hundred feet out when the two whistles sounded, and that he commenced to back, and that after he had commenced backing he got another signal from the Electra that the latter intended to go astern of him; that he rung to go ahead, and that the collision immediately took place.

On the other hand, Captain Nye, who had charge of the Electra, and who was in her pilot-house, says that he sounded his two whistles before the Astoria left her slip, but that the latter came out and got nearly ahead of the Electra, when one whistle was sounded by him to indicate to the Astoria that he was going to the right, and that at the same time he put his wheel hard aport. He says at that moment the Astoria commenced backing, which brought her in the track of the Electra. He says that he could not then change so as to cross her bow, and that if the Astoria had not backed contrary to his last signal, he should have passed her stern in safety.

No signal was given by the Astoria, as she had no whistle. There was considerable running ice and a strong flood tide in the river at the time. I have compared the evidence very carefully, and on the whole am inclined to the opinion that the Astoria was in and just leaving her dock when the two whistles were blown. The evidence on both sides is extremely inconclusive and unsatisfactory. The pilot is the only person on the Astoria who heard the two whistles. There was evidently some alarm on her, as well there might be, for the Electra was not far off as she came in sight round the point of Horn's Hook, and was coming at a pretty rapid

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The Steamer Electra.

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rate, as her captain states, at a speed of twelve miles an hour. This was too great a speed for such a steamer in the vicinity of ferries near a large city, with the river full of running ice which would render the movements of small craft slow and uncertain. The Electra was a large boat while the Astoria was a very small one, and I am inclined to the opinion that the latter did not get much backward way on her, after she reversed her wheels, with the ice as it then was.

On the whole, as the best result I have been able to reach in this doubtful case, I decide First, that the Astoria was in fault in not holding back for the Electra to cross her bow ; Second, that the Electra was in fault in not slackening her speed as soon as she rounded the point of the Hook. If she had done so she would probably have been able to have backed soon enough to have avoided the collision.

The omission of the Astoria to carry a whistle, was gross negligence, though it is not easy to see that this circumstance had any influence on the movements of either boat at this time. I note this fault of the Astoria therefore, not because it is important in this case, but to avoid any inference in future that it is sanctioned by the court.

Let a decree be entered in conformity with this opinion, with an order to a commissioner to compute the damages.

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The Steamer Carroll

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JULY, 1867.

## THE STEAMER CARROLL.

COLLISION IN CHESAPEAKE BAY.—STEAMER AND SCHOONER MEETING.  
—DUTY OF STEAMER.—EVIDENCE.

Where a steamer and schooner meeting each other in Chesapeake Bay, the schooner bound down the bay with a free wind, but, as she claimed, holding her course, and her course being to westward of that of the steamer, and the steamer, as the vessels approached, put her wheel hard aport and stopped and backed, but a collision occurred :

*Held*, That it is the duty of steamers to give way to sailing vessels with a free wind, as well as those close hauled.

That the vessels having seen each other several miles apart, the collision could only have occurred by gross fault on the part of one or both vessels.

That the claim of the steamer that she stopped and backed when the schooner was nearly a mile off, bordered on absurdity.

That her claim that the schooner when nearly a mile to the westward of the steamer, and nearly abreast of her, suddenly starboarded and went to the eastward to cross the steamer's bows, was also unreasonable.

That the court was therefore compelled to discard the steamer's theory and accept that of the schooner, which was simple and consistent with one exception.

That if the schooner was to the westward, and changed her course, as alleged by the steamer, then the order to stop and back the steamer was an error, and that on the other hand, if the schooner was nearly ahead, then the steamer should have starboarded instead of putting her helm hard aport.

That very little reliance could be placed upon the testimony of a witness who had contradicted himself on cross-examination, whether the discrepancies arose from forgetfulness, disingenuousness or dullness.

This was a suit by Wesley Egbert, master and part owner of the schooner Elijah Shedden, to recover the damages sustained by her in a collision with the steamer Carroll belonging to the Baltimore & Ohio Railroad Co., which occurred on the evening of the 21st of December, 1865. At about half-past seven o'clock that evening, the schooner was bound down Chesapeake Bay, before a free wind with her sails wing and wing, at a speed of

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The Steamer Carroll.

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four or five miles an hour. When off, or a little above the Rappahanoc, she discovered a light which proved to be that of the steamer Carroll, bound up the bay. The vessels were then several miles apart and sailing on nearly opposite and parallel courses. They continued to approach each other until a collision took place, the steamer striking the schooner on her starboard side about twelve feet forward of her taffrail, and the latter sunk in five or six minutes. The weather was clear with a moderately fresh breeze. The steamer also discovered the schooner several miles off.

Three witnesses were examined by the libelants, and they substantially agreed in saying that they first discovered the bright light of the steamer two or two and a half points on their starboard bow, and as it drew nearer they discovered her green light; that the schooner continued her course without change, while the steamer approached, and, when two or three hundred yards from the schooner, suddenly ported her wheel, showing her red light, and struck the schooner as already stated; that the only movement attempted on the schooner was made by her captain after he saw the steamer had changed her course and was coming into the schooner, when he seized the wheel and attempted to throw it astarboard, but that it was too late; that the light of the steamer when first seen was four or five miles off, and that from that time to the collision was twelve or fifteen minutes. These witnesses insisted that from the time they first discovered the Carroll's light, down to the time she changed her course, she was to starboard of the course of the schooner.

On the part of the steamer there were examined, Lennan, her master, Fuller, the second mate, who was on the bridge, Thompson, a seaman, who was with him, and Peters, another seaman. Their claim was, that the schooner's light was seen a little on the steamer's port

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The Steamer Carroll.

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bow, whereupon the steamer's helm was put aport a little to show her red light; that the vessels then kept on till the schooner was from half a mile to a mile distant when it was discovered that the schooner had changed her course by starboarding her wheel, whereupon the captain of the steamer gave the order at once to put the wheel hard aport, and to stop and back, but the collision was then inevitable. The reason given by the captain of the steamer, for porting and backing at this time was to stop her way, and throw her bow to port, so as to let the schooner cross his bow if she could; that the action of her propeller, backing on a port helm has the effect to throw her bow to port, while backing on a starboard helm brings her bow to starboard.

For libelants, *Beebe, Dean & Donohue.*

For complainants, *John H. Platt.*

SHIPMAN, J. After setting forth the testimony of the witnesses at some length, and saying that as the vessels saw each other when several miles apart, no collision could have occurred without great fault on one or both sides, proceeded as follows :

On one point the testimony of the witness Thompson, is confused and inconsistent. He repeats the statement that the steamer was stopped and backed as soon as the order to hard aport was given, which was when the vessels were a mile apart as near as he can judge. On the cross-examination he distinctly states that the steamer was not stopped and backed until a considerable portion of this mile had been run over, and that they were very close when this order was given. Very little reliance can be placed upon testimony of this character, whether such glaring discrepancies arise from forgetfulness, disingenuousness or dullness.

The impression derived from reading the first part of

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The Steamer Carroll

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Peters' testimony is that the first order to port and then steady, was given when the schooner's green light was discovered, when, as he thinks, she was three-quarters of a mile or a mile from the steamer, and that the latter after falling off a point ran some little time before the order to hard a-port was given. But in the subsequent part of his statement he proceeds upon the idea that the first order to port was given when the schooner's light was first discovered, about four miles off. He says, however, that the order to stop and back was given immediately on the order to hard a-port. Captain Lennan, and Fuller, the second mate, confirm him on this point, and the former agrees that at that time the vessels were half or three-quarters of a mile apart; that is, on a diagonal line drawn from one to the other.

None of the witnesses for the claimants charge the schooner with changing her course from the time she was discovered till she had reached this point about three-quarters of a mile off from the steamer, when she showed her green light, and the steamer put her wheel hard a-port, and rang to stop and back.

Assuming, then, that the first change charged on the schooner was made as stated by the claimants' witnesses, let us see what must have been the relative positions of the vessels. They all agree in placing the schooner well to the westward or port of the track of the steamer when the former was discovered. They agree that no change took place till she had approached within about a mile. As they were both sailing on nearly parallel courses then, and the steamer immediately ported a point, and held that course, diverging from the track of the schooner for three or four minutes, it follows that the schooner, when she changed her course, must have been over a mile, or at least a full mile, to the westward of the steamer's course; in other words, she must have been off to the westward at least five points on the steamer's port bow, and drawing down abeam of her. Now if the

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The Steamer Carroll

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schooner's helm had been put hard a-starboard at this point, giving her a course at right angles to that of the steamer, and the latter had kept on, it is very doubtful if a collision could have taken place. The Carroll was making greater speed than the schooner, and would in all probability have reached and passed the point of intersection before the schooner reached it. The distance the vessels had to travel was about equal. But it is not necessary to apply this test, for it is clear on the evidence in behalf of the Carroll, that, whatever change she then made, she did not hard a-starboard, thus approaching the steamer's track at right angles. This is plain from the fact insisted on that the steamer, as soon as the schooner changed, reversed her engine, and soon lost headway. Yet the schooner came down and struck the steamer's bows. It follows irresistibly that the schooner, from the point where her alleged change of direction took place, must have sailed on a diagonal line to the steamer's track; and had the latter kept her course, even without any change, she would have clearly passed the point of intersection before the schooner got there. Such a change of the schooner involved no risk of collision. Had the steamer kept on, the schooner would have passed under her stern with safety. On the Carroll's own showing, all she did to avert the collision was, when she saw the schooner coming toward her, to stop in her track and let the latter run down to her, and this she did when the schooner was three-quarters of a mile or a mile off! Viewing the evidence for the Carroll in any light in which I have been able to place it, I fail to see that it furnishes a satisfactory explanation of the collision, or one which either disproves that given by the schooner or vindicates the steamer. The theory of the latter is an impossible one; and the assertion that she stopped and backed when the schooner was nearly a mile off borders on absurdity. Equally unreasonable is the claim that the schooner, when off nearly a mile to the



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The Steamer Carroll

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westward of the track of the steamer, and nearly down to her, suddenly starboarded and went to the eastward to cross her bows. The court is therefore compelled to discard the theory offered by the Carroll, and accept that of the schooner, which is simple and consistent, except that part of it which places the course of the steamer considerably to the westward of the track of the schooner.

It is useless to speculate on the subject, but it looks very much, in view of the evidence as a whole, as if these vessels approached each other nearly head and head for several miles, without any apprehension of danger, when the steamer, on discovering the schooner's green light, suddenly put her wheel hard a-port, under some mistake as to the relative positions of the vessels. This view of the courses of the vessels and their relative positions is strengthened by the statement of Thompson, who says that when he first discovered the schooner's red light, she bore nearly north, as he thinks; and by Peters, who states that when he saw the schooner's green light he thinks he saw her red light also. These two statements are consistent with the claim that the schooner made no change in her course. Whether the steamer was misled by some one of the numerous lights, which one of her witnesses says were ahead before she came up near the schooner, or whether the order to hard to port was inadvertently given on suddenly discovering that the schooner was near, it is impossible to say; but it is clear that if the schooner was to the westward, in the position assigned her by the steamer, when the former made her alleged change of course, then the order to hard a-port was correct; but the order to stop and back was an error, for had she kept on hard a-port, she would have cleared the schooner with perfect ease. If, on the other hand, the schooner's green light was nearly ahead, or a little on the Carroll's port bow, then the latter should have starboarded, for, according to the

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The Ship Patrick Henry.

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Carroll's own evidence, the schooner was nearly a mile distant, running on a starboard helm. The vessels would have then passed each to the left of the other.

But, as already intimated, the court is compelled to accept the theory of the libellant's witnesses, especially as to the course and management of the schooner; and as she did not, according to their statement, change her course, the steamer must be held in fault. It was her duty to take early measures and clear the schooner. It is now settled by the courts of this country that it is the duty of steamers to give way to sailing vessels with a free wind, as well as those close hauled.

Let a decree be entered for the libellant, with an order of reference to a commissioner to compute the damages.

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JULY, 1867.

## THE SHIP PATRICK HENRY.

## BILL OF LADING.—SOVEREIGNS AS FREIGHT.—DAMAGES.—INTEREST.

Where British sovereigns were shipped on board a vessel in Melbourne, under a bill of lading by which the ship agreed to carry them to New York, and there deliver them, on payment of £2 freight, and the ship failed to deliver them, and the indorsee of the bill of lading libelled the ship to recover his damages, the only question being as to the rule of damages:

*Held*, That the agreement in the bill of lading was not a promise to pay money, but to transport articles on freight.

That the value of the sovereigns in the port of delivery might be recovered by the holder of the bill.

That that value was to be estimated in the currency of the country in which the port of delivery was situated and where the suit was brought, it not having been otherwise stipulated in the contract itself.

That the Legal Tender Act (12 *Stat. at Large*, p. 582) and the decisions under it had no application.

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The Ship Patrick Henry.

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That though no freight was strictly earned, as the contract was not fulfilled, yet admiralty courts have power to do substantial justice, which in this case is to make the libellant good for his loss, charging him with the freight.

That the stipulation for freight was a promise to pay money, and the freight must be reckoned in currency according to our laws, which fix the legal value of the pound sterling in commercial transactions at \$4.44.

That the libellant was entitled to recover interest on his damages at seven per cent.

This was a suit brought by Reuben Ross, Jr., against the ship Patrick Henry, *in rem*, to recover damages for the breach of the following bill of lading :

“Shipped, in good order and well conditioned, by James Patrick, in and upon the good ship or vessel called the Patrick Henry, whereof is master for the present voyage Wm. Page, and now riding at anchor in Hudson Bay, and bound for New York, one bag containing ninety sovereigns British sterling, being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the aforesaid port of New York (the act of God, the Queen’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, excepted), unto order, or its assigns, he or they paying freight for the said goods, £2 sterling in full, with primage and average accustomed. In witness whereof, the master or purser of said ship or vessel hath affirmed to four bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void. (Signed) WM. C. PAGE.

“Dated in Melbourne, Sept. 19th, 1865.”

The ship upon which this coin had been placed on freight proceeded to New York, and arrived there from Australia in December, 1865. The libellant was the indorsee of the bill of lading, and as the ship failed to deliver the coin according to the terms of the contract, he brought this suit to recover damages for the breach.

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The Ship Patrick Henry.

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The only question was as to the true rule of damages, the breach being admitted.

For libellant, *James K. Hill*.

For claimants, *Hawkins & Cothren*.

SHIPMAN, J. The libellant in this case claims that he is entitled to recover the market value of the coin at this port at the time it should have been delivered. The claimant, on the other hand, insists that in estimating the damages, the value of the sovereign should be taken at the rate fixed by law for computation in ordinary commercial transactions, the same as if this were a suit to recover the amount of a bill of exchange or other promise to pay. I do not accede to this view. The agreement in this bill of lading is not a promise to pay money, but to transport certain articles on freight. Whether those articles were gold coins, gold bars, gold dust, or gold in any other form of use or ornament, can make no difference. Like every other article placed on freight and covered by a bill of lading, unless delivered according to the terms of the contract of affreightment, their value may be recovered by the holder of the bill. That value is to be estimated in the currency of the country in which the port of delivery is situated and where the suit is brought, unless otherwise provided for in the contract itself. The proof is that these sovereigns were worth in this market, at the time they should have been delivered, \$7.05 apiece in our money. Our recent legal tender act and the decisions under it cited at bar have no application to this part of the case.

There is another question of trifling importance so far as the amount depending upon it is concerned, which requires to be disposed of; and that is whether any deduction should be made on account of freight. No freight was strictly earned, as the contract was not fulfilled. But admiralty courts have power to do substan-

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The Bark Havre.—The Ship Scotland.

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tial justice between parties, and substantial justice in this case is to make the libellant good for the loss sustained. He is, under this breach of the contract, entitled to the value of ninety sovereigns at the market rate, less two pounds sterling freight money. As the stipulation to pay these two pounds was a promise to pay money at this port, they should be reckoned in the currency of this country, according to our laws. The legal value of the pound sterling in commercial transactions in this country is fixed by act of Congress at \$4.44. The value of ninety sovereigns at the time of the breach was \$634.50. From this deduct two pounds sterling, computed in our money (\$8.88), and it will leave \$625.62—the principal sum, which the libellant is entitled to recover. To this should be added interest at the rate of seven per cent. from December 28, 1865, to the date of the decree. The clerk of this court is hereby directed to compute the interest, and add to it the principal sum. Then let a decree be entered for the amount of principal and interest in favor of the libellant, with costs.

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JULY, 1867.**THE BARK HAVRE.—THE SHIP SCOTLAND.**

**COLLISION AT SEA OFF SANDY HOOK.—OWNERSHIP.—PLEADING.—  
BOTH VESSELS IN FAULT.—LOOKOUT.—VESSEL UNDER SHORT  
SAIL.—RIGHT OF MASTER TO BE PRESENT AT THE EXAMINATION  
OF HIS CREW AS WITNESSES.**

Two sailing vessels, a bark and a ship, came in collision in the night, ten or fifteen miles southeast of Sandy Hook. Both were close hauled, the bark being on her port tack; and though the lights could have been seen at a distance of more than a mile, the lights of the ship were not seen till the green light was seen

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within a quarter of a mile off. The bark was under short sail, so that she could not tack, but only wear ship, and she did not change her course after discovering the light, till the collision.

The ship saw the bark's green light ten or twelve minutes before the collision. She was on her starboard tack, and did not change her course till the collision. Her lookout, after reporting the light, went aft. The pilot who was in charge of her testified that he saw the bark's green light and then her red light, and he then went to the weather side to see if there were any vessels on that side, and when he came back, the green light was again in view, and it was too late to avoid a collision. The other hands on the ship testified that they saw the lights and their changes, but with slight variations. The ship made no change of her course, and struck the bark fourteen or fifteen feet from her stern, in such a way that a slight starboard movement of the ship's wheel would have avoided the collision.

On the trial, objection was made on the part of the ship, that the libellant, who had libelled as owner of the bark, had failed to prove his title.

The court having suggested that the pleadings in behalf of the ship did not set forth with particularity the way in which the fault of the bark caused the collision, it was insisted, on behalf of the ship, that the allegation was explicit enough, and that if it were not, no advantage could be taken of it, because no exceptions were filed.

Depositions of the crew of the ship were read, from which it appeared that when they were being taken, the proctor for the bark objected to the presence of the master of the ship, on the ground that his presence might exercise an undue influence over the witnesses, and the commissioner excluded him. To this exception was taken.

*Held*, That proof of the title to the bark by her alleged owner might be given after the trial.

That the libel and answer should set out clearly and explicitly, though briefly, the facts relied on, and that in collision cases this is especially important.

That the court has the power, in any stage of the case, to require the parties to supply any defect in the pleadings, though counsel can appeal to the court for that purpose, only by exceptions filed at the proper time.

That the commissioner was in error in excluding the captain of the ship from being present at the taking of the depositions of his crew. It was not only his privilege but his duty to be there, especially as he was a stranger contesting his rights before a foreign tribunal. He should not have been excluded unless his contumacy compelled that course.

That the bark was in fault for not seeing the light of the ship sooner. Being on ground where vessels are numerous and there is great danger of collision, being under short sail and not able to answer her helm promptly, and being on the port tack, it was her duty to exercise unremitting vigilance in looking out for approaching lights. If she had done so, she would have seen the light sooner, and could have kept out of the way.

That it was the duty of the bark, having the wind on her port side, to keep out of the way of the ship, which was crossing her track so as to involve risk of collision.

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That she gave no sufficient excuse for not doing this.

That the lookout of the ship was remiss in leaving his post after reporting the light, and that the pilot in charge was also remiss in going to look out for other vessels.

That every vessel is bound to avoid a collision if she can, and the fault of one approaching vessel does not authorize another to run her down.

That after the change in the bark's lights had occurred, which was alleged to have been seen from the ship, and the green light of the bark was alone visible, the ship might have hove her wheel to starboard and avoided the collision, and as it was clear that the only way of escape for her was to starboard her wheel, and, if she had done it, no collision would have occurred, she also must be held in fault for not having done so, and the damages must be apportioned.

These two cases were cross libels, the one filed by J. H. Richardson, owner of the bark Scotland, against the Norwegian ship Havre, and the other by Thomas Thommesen and others, owners of the Havre, against the Scotland, to recover the damages occasioned to the two vessels by a collision between them, which took place on the night of January 20, 1866, at sea, about ten or fifteen miles southeast of Sandy Hook. Both vessels were bound to New York.

The facts of the case appear in the opinion of the court.

For the Havre, *C. M. Da Costa*, and *C. Donohue*.

For the Scotland, *Bowdoin, Larocque & Barlow*, and *W. Q. Morton*.

SHIPMAN, J. Before examining the case on its merits, I notice two preliminary questions. The first is the objection raised on the part of the Havre, that the alleged owner of the Scotland has failed to prove his title. It is intimated by the advocate of the Havre that this is not a mere technical objection; that the omission of such proof on the part of the Scotland was not a mere inadvertence, but that this issue was avoided because it could not be proved that the libellant Richardson was the owner. On the other hand, it is claimed on the part of the Scotland that the failure to prove title was inad-

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vertent, and that this proof can be supplied without difficulty. If this latter statement is correct, I should not be justified in dismissing a suit of this character where the fact can be easily supplied. Proof of title should be made, and I will permit evidence to be gone into on both sides, on this single point, hereafter. This cannot embarrass the owners of the Havre.

The other question arose out of a suggestion of the court at the trial, on the pleadings being read, that the answer of the Havre to the Scotland's libel, and the original libel of the former, did not set forth with sufficient particularity the manner in which the alleged fault of the Scotland caused the collision. The advocate for the Havre insists that the allegation is sufficiently explicit; and that, if it is not, no advantage can be taken of it because no exceptions were filed. I think the allegation in question is not in the general sense of the law of pleading sufficiently full and specific, but as the controversy, as developed on the trial, is of a simple character, the defect in the averment is not attended with any embarrassment. No amendment will therefore be required in this court. But to avoid misapprehension hereafter, it is proper to state in this place, that I by no means accede to the suggestion of the advocate of the Havre, that all defects of this character are to be overlooked by the court unless preliminarily excepted to by counsel. If counsel omit to file exceptions at the proper time, they are precluded from raising objections to the pleadings; but this court, at all times, upon its own motion, has power to compel the parties to conform their pleadings to rules laid down by the Supreme Court. Rule 23, in relation to libels, and rule 27, relating to answers, should be observed, as conformity thereto contributes to the clear and orderly proceedings in the case, and tends to simplify and facilitate the labors of the court. This court has more than once been embarrassed in the disposition of collision cases by the vague allega-



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tions of both libel and answer where no exceptions had been taken to either, and has, in one instance, dismissed a case on the ground that the pleadings as well as the proofs were not sufficiently explicit to found a judgment thereon. Of course it is well understood that the technical rules of special pleading at common law are not to be applied to a libel and answer in a suit in admiralty, but it is equally true that the libel, and the answer where it goes beyond a denial of allegations of the libel, should clearly and explicitly, though briefly, set forth the facts relied on. This is especially important in collision cases. Clear statements in the pleadings tend to produce an orderly arrangement of the proofs. The proofs then naturally crystallize around the allegations, which conduces to an easier and more lucid exposition of the material points in the controversy. To secure this result, the court has the power in any stage of the case to require the parties to supply any defects in the pleadings, though counsel can appeal to the court for this purpose only by exceptions filed at the proper time.

We come now to the merits of this case. The collision took place between nine and ten o'clock in the evening. The night was fair, starlight, though perhaps not with as perfectly clear atmosphere as is sometimes the case. There was a fresh breeze, blowing at the rate of ten or twelve knots. There was some sea, but not very heavy. The allegation in the Scotland's libel that it was blowing a gale, with a very heavy sea and a mist on the water, is not sustained by the proofs. The wind was about northwest by west. The Scotland was on her port tack, under short sail, and heading north by east and moving slowly, not more than three miles an hour. The Havre was heading about southwest on her starboard tack, under a heavier press of sail, and moving at the rate of eight knots. She was a ship of nearly one thousand tons burden, and the Scotland was a bark of nearly four hundred tons. The vessels had been on these respec-

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tive tacks for some time preceding the collision, and were both close hauled. Both had green and red lights. The Havre discovered the green light of the Scotland about two points on her lee bow, some two miles off, and about fifteen minutes before the collision. Those in charge of her movements assert that she did not change her course till the collision; that she was kept steadily on the wind to the last. The witnesses from the Scotland say that the Havre appeared to be passing her to to leeward, and, when about abeam of the Scotland, luffed up into the wind and struck her, with her sails shaking. But this latter statement I do not credit. Upon no fair view of the evidence, as a whole, can it be entertained. I hold, therefore, as matter of fact, that the Havre kept her course by the wind from the time she discovered the Scotland's green light approaching her for about fifteen minutes, when she struck the Scotland fourteen or fifteen feet from her stern as the latter was crossing her track in front of her. This blow carried away a large portion of the Scotland's stern, and did considerable damage. It would seem that a slight starboard movement of the wheel of the Havre would have averted the collision. Whether this could and ought to have been done is the only delicate or doubtful question in the case. This point will be considered at length hereafter. I hold that the Scotland was in fault for not having discovered the green light of the Havre sooner. This discovery was not made until the vessels were very near. Capt. Maynard, of the Scotland, saw the Havre's light immediately after it was reported, and says it was then not more than an eighth or a quarter of a mile off—of course he would not place the vessels nearer together than they actually were, in his testimony—when the Havre's light was discovered. They were, therefore, without doubt, very near, in view of his statements. Indeed, they were so near when the Havre's light was first sighted as to produce some excitement, if not alarm,

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on board the Scotland. This is quite evident from the fact stated in the Scotland's proofs, that her second mate came running, or, to use a more expressive phrase of Capt. Maynard, came "rushing" aft as soon as the light was announced by the lookout. The second mate saw it, four or five points on the lee bow, and immediately ran aft to report it to the captain. Now, in the then state of the weather, and the positions and courses of these vessels, the green light of the Havre could have been discovered by the Scotland probably two miles, but, beyond all doubt, more than a mile off. Yet her captain says that in fact it was first seen at a distance at the furthest of not more than a quarter of a mile. This becomes a serious fault when we consider the situation and responsibility of the Scotland. In the first place, she was on ground frequented constantly by a large number of vessels seeking and leaving the port of New York, where there is great danger of collision, as is well known to navigators. In the second place, she was under short sail, moving at a low rate of speed, and therefore unable to obey her wheel promptly. Thirdly, being on the port tack, she was bound to keep out of the way of all vessels on the starboard tack which might be crossing her track so as to involve risk of collision. (*Art. XII., Act of Congress approved April 29, 1864; 13 U. S. Stat. at Large, p. 60.*) In this condition, and with this responsibility on her, it was clearly the duty of the Scotland to exercise unremitting vigilance in looking out for approaching lights, that she might take timely measures to discharge her duty. If the proper vigilance had been exercised, she would have discovered the Havre's green light sooner, and could have kept out of the way without difficulty.

Now, assuming that the Scotland did not change her course at all, as her witnesses testify, from the time she discovered the Havre's green light, we have the case of two sailing vessels, in the open sea, crossing so as to in-

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volve risk of collision, and both holding their courses till a collision takes place. One should have kept out of the way while the other held her course, and the statute cited is explicit as to whose duty it was to give way—the vessel which had the wind on the port side. This was the Scotland. What excuse does she offer for not doing so? I have already pronounced her in fault for not sooner discovering the Havre's green light; but it is in evidence that she had shortened sail to such an extent that she could not tack, but only wear ship. What necessity there was for her reducing her canvas to the extent she did, does not clearly appear. As the proof stands, the wind was not sufficiently strong to have prevented her from carrying sail enough to enable her to execute any ordinary manœuvre with reasonable promptness. There was no gale, nor any heavy sea. But the evidence fails to show that she was well manned. Though the proof is not entirely clear on this point, yet I infer that she had but five men, exclusive of the captain, two mates and steward, whereas she ought to have had eight. Her shortened sail and slow speed may have been owing to this deficiency in her crew. What she had may not have been able to work her in that breeze with the requisite sail to enable her to be handled with promptness and ease. But it may be said that, whether she was short-handed or not, she had a right to determine the amount of canvas she would carry and the speed she would make. The only remark I deem it necessary to make here is one already hinted at, and that is, that the fettered condition to which she was reduced imposed upon her the duty of exercising the most active diligence in early discovering approaching lights, so that she might take measures in time to discharge the obligations of a vessel on the port tack toward those advancing on the starboard tack.

I now come to another point in the case. It is a rule of prudence and sound sense, often reiterated in judicial opinions, that every vessel is bound to avoid a collision if

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she can. The fault of one approaching vessel does not authorize the other to run her down because she happens, even through her own folly, to lie in her wake. I am well aware that where the law charges one vessel with the duty of keeping out of the way of another, the corresponding duty of the other to keep her course is to be rigorously enforced. But it is to be enforced with intelligence and in the interest of safety, and not to be enforced, or even permitted, blindly, to destructive ends. It is therefore proper, in view of the fact that the Havre clearly saw the Scotland for fifteen minutes before the collision, watched her approach, with more or less care, for two miles, and without the slightest change in her course, struck the latter only a few feet forward of her stern, to inquire whether she did her whole duty—in other words, whether the slight change in her wheel to starboard necessary, in order to have enabled her to clear the Scotland, might not, and ought not, to have been made? The witnesses of the Havre all, or nearly all, concur in stating that the Scotland presented her green light first, and continued to present it for some time. They differ as to the time this light first continued in sight, the lowest period being seven or nine minutes, and the highest, ten or twelve. This is not material. She continued for some time uniformly presenting her green or starboard light. It was, during all this time, supposed by the Havre that the Scotland was going to cross the former's weather-bow. Most of the witnesses also concur in stating that, at the end of the time named, the red light of the Scotland appeared. Some state that the green light did not entirely disappear, but grew dim—others that it entirely disappeared. The impression seems, then, to have prevailed on the Havre that the Scotland was falling off on a port helm to pass the former to leeward. Soon, however, her red light was lost, and the green reappeared. This, of course, indicated that the Scotland was then heading across the Havre's

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bow. The question already indicated here presents itself—could, and ought the Havre to have starboarded and fallen off so as to have cleared the stern of the Scotland? This, as I have once intimated, is the most difficult point in the case, and I have re-examined the evidence upon it with great care.

Mortensen, the mate of the Havre, after stating that he saw the green light ten or twelve minutes, says: "Next saw her red light and a little part of the green light, some two or three minutes. Then saw the green light again and shadow of the sail—its outlines. I could not (then) see the red light. The collision took place in one or two minutes." This witness adds that, after the green light reappeared, there was no time for the Havre to do anything. Rasmussen, a sailor and lookout on the Havre, after stating that he saw the green light for some time, says, "that he then saw the red light, the green partially disappearing; saw the red light and part of the green for about two minutes; then the red light disappeared, and the green again appeared in full view; then I saw the green light on our starboard bow; then the collision occurred."

Christiansen, another sailor on the Havre, says that he saw the green light for some time, then the red, with the green partially obscured, and, "I then lost sight of the red light and saw the green more plainly; then the Scotland luffed up forward of the Havre; then, for a couple of seconds, I saw nothing, \* \* on account of the intervening rigging of the Havre; then I saw two masts and topsails on the Havre's starboard bow; the vessels were then in collision." Jonassen, also one of the Havre's seamen, says: "As soon as I saw the green light alone for the second time, the collision occurred; the time was so short, I cannot tell exactly; perhaps it was a minute." The Sandy Hook pilot, who was on board and in charge of the Havre, testifies that he saw the green light some ten minutes, and supposed that the

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Scotland was going to cross his bow ; then he saw the red light, the green wholly disappearing. He then supposed the Scotland was going astern of the Havre. He was then standing on the lee side. He walked across the ship to the weather side, to see if there were any vessels on that side, and when he came back the red light had disappeared, and the green one was in full view. He says that the Scotland was then so near that he could not clear, one way or the other. He says that the Scotland's luffing, by which her red light was hidden, and her green disclosed again, occurred while he was going to and returning from the weather side of the ship.

The witnesses for the Havre were intelligent, much more so than those of the Scotland, and their testimony bears marks of becoming moderation, caution and accuracy, and I cannot resist the conclusion, from their statements, that, from the time the green light began to reappear, and the red light disappear, there was time for the Havre's wheel to have been starboarded, and that had this been done, she would have kept away, and cleared the Scotland. It is admitted on all hands that she was easily handled. She was under favorable speed for that purpose, and although she then carried a little weather helm, yet, according to the pilot, she carried a little more forward than aft sail. And he says that after the collision, he put her helm up and she went right off, though her forward sails were all gone. The difficulty with this part of her case is, that she had no one on the lookout at this critical moment. Her lookout, who had reported the light, had gone aft. The pilot had gone to the weather side of his ship to look after other possible vessels, a duty which belonged to some one else. The "yawing" charged on the Scotland, and the discovery of her red light, was ample notice that there might be danger, and the utmost vigilance was incumbent on the Havre. Instead of her regular lookout being permitted to go aft, he should have been kept at

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his post, and a trusty officer or seaman, instead of the pilot, sent forward to look for other vessels, while the lookout watched and reported every change in the Scotland's lights. Had this precaution been observed—in other words, had the lookout kept his post, and reported every change in the Scotland's light as soon as each change was visible, I have little doubt that her wheel would have been put up in time to have saved the collision.

I am inclined to the opinion that the movement of the Scotland, by which her red light was disclosed to the Havre, took place when the order was given on board the former to wear ship. This was done just about the time she discovered the Havre's green light. Her witnesses say that the execution of this order had not been commenced when the captain ordered that she be kept close by the wind. Her witnesses also deny that any movement of the Scotland was made which could have disclosed her red light to the Havre. But I accept the statement of the Havre's witnesses that they did see the Scotland's red light. I think the latter's witnesses are mistaken, and that when the order to wear, or be ready to wear, ship was given, she was suffered, perhaps inadvertently, to fall off, so as to present her red light to the Havre, with her green partially obscured. The fact that her green light was not wholly hidden from the Havre, shows that she had not kept away to any great extent. Several of the witnesses of the Havre say that the Scotland could not have gone to leeward of her without falling off more. I think, therefore, that the variation in the Scotland's lights took place just about the time she discovered the Havre. Though this was but a brief time before the collision, I think that, even after these fluctuations had settled in presenting, at last, only her green light to the Havre, the latter might have hove her wheel a-starboard and avoided the collision. I can not doubt that after the Scotland did discover the Havre's light,



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the former kept close by the wind. I am unwilling to impute perjury to her witnesses on this point. Their salvation and that of their vessel depended upon adhering to that course. As to what they say they saw of the Havre's lights and movements, I place little confidence in it, for it is evident that there was alarm, if not panic, on board of the Scotland from the moment the second mate came rushing aft to report the discovery of the Havre's light. There was, however, no panic or alarm on the latter vessel. Her movements and those of her crew were under perfect control, and had her lookout been forward at the critical moment, where he ought to have been, and instantly reported the last change of lights on the Scotland, the Havre might, and I think would, have cleared her.

There would then have been no doubt as to what course to pursue, for to starboard her helm was the only road toward safety, from which the vessels were separated only by a few feet. I am not called upon to explain why the pilot of the Havre left the lee side of his ship and went to the weather side to look after other vessels, or why the lookout left his station on the forecastle and went aft, or why there was no attempt whatever on the part of the Havre to avoid the collision at the moment when it was imminent. There was no confusion on board of her; no one there was paralyzed by fear, and it is difficult to repress the suspicion that, after all, she mistook the speed at which the Scotland was moving, not supposing that she was under very short sail, and therefore naturally concluding that she was moving much faster than she really was in fact, the Havre supposed that by the time she struck the line on which the Scotland was sailing, the latter would be out of the way. This is the only way I can account for the failure of at least an attempt on the part of the Havre to clear the Scotland. It follows, from these views, that a decree must be entered against both vessels, apportioning the damages. It

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must be understood, however, that I do not assent to the propositions of the Scotland's advocates, that the Havre was bound to alter her course simply because a collision was probable. There was risk of collision apparent for several minutes before it actually took place. The responsibility of avoiding it rested chiefly on the Scotland. She was bound to keep out of the way, and the Havre was bound to keep her course until it was apparent that the collision could not be avoided without a change on her part; and I hold her responsible on the sole ground that after it was clear that the only way of escape was for her to starboard her wheel, she failed to do it, and that if she had done it, no accident would have occurred. I am less reluctant to come to this conclusion, from the fact that there was, as I think, a remission of diligence on the part of the lookout and pilot of the Havre at the critical moment when the most exacting attention was required.

I find one ruling of the commissioner who took the depositions in this case, which requires remark, and to which exception was properly taken. After the examination of one witness on behalf of the Havre, the proctor for the Scotland objected to the presence of the master of the Havre during the examination of his witnesses and crew, on the ground "that his presence might exercise an undue influence over them, and because of his tendency to interrupt." The commissioner, after some further debate between counsel, excluded him. This was an error. So long as the captain comported himself properly, it was not only his privilege, but his duty, to be present during the taking of the proofs. This was especially so in view of the fact that he was a stranger, contesting his rights in a foreign port, and before a foreign tribunal. He was the agent of his owners, as well as the master of his ship, and rested under a double responsibility. The fact that he was to be examined as a witness did not vary his rights or duties. If

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he interrupted the proceedings, he could have been admonished by the commissioner, and I doubt not the latter was able to keep order. He should never have been excluded from the room, unless his contumacy compelled that course. Strangers should be treated with forbearance, and their rights shielded in the courts of every nation, especially in courts of Admiralty, where laws binding alike upon all nations are administered. After the proof of ownership on the part of the Scotland is furnished, let decrees holding both vessels in fault be entered, with an order of reference to a commissioner to report the damages.

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AUGUST, 1867.

## THE SHIP ADELE.

## PRACTICE.—PRIORITIES.—STATE LIENS.

Where several libels were filed against a ship by material men, and the vessel was sold, and application was made to the court to decree payment out of the proceeds, the last libel filed being to enforce a lien given by the law of the State of New York :

*Held*, that the court had no jurisdiction to enforce the State lien.

That the other decrees should be paid in the order in which the libels were filed, each decree being paid with its costs until the fund was exhausted.

Several libels were filed by material men claiming liens against the ship Adele. The vessel was sold without opposition, and the proceeds paid into court, and the several libellants, having had the reports of the commissioner as to their several amounts confirmed by the court, applied to the court to decree payment out of the funds.

The libel last filed was by Charles Wall and others for supplies, but they claimed a priority in payment over all the others.

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SHIPMAN, J. Decrees in favor of the material men, on their several libels, according to the amounts found due on confirmation of the commissioner's reports in the several cases, are to be entered and satisfied, out of the funds in the registry of the court arising out of the sale of the ship, in the order in which the libels were filed. The amount of each decree, together with the costs, in the above named order, is first to be paid, until the fund is exhausted. The claim of priority set up by the libellants, Charles Wall and others, is disallowed. The libel in this latter case seeks to enforce the lien given by the local law of the State of New York, and not to enforce the lien given by the general maritime law. Since the alteration of the twelfth rule of the Supreme Court of the United States, these local liens cannot be enforced by proceedings *in rem* in this court, although the language of the rule, as modified, refers only to domestic ships. The object of that court in the alteration was to relieve the courts of the United States from the "necessity of examining and expounding the varying lien laws of the State, and of carrying them into execution." (*The St. Lawrence*, 1 Black, p. 530). This libel avers no lien, except that under the State law, but expressly avers that the libellants filed specifications and items of the articles furnished in the county clerk's office in the county of New York, under the State law, and that the claim thereby became a lien. As I understand the law, the process *in rem* cannot be used in this court for the enforcement of such a local lien, and, therefore, this court is without jurisdiction. Let a decree be entered, dismissing this case of Charles Wall and others, without costs.

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James Kennedy, et al., v. William E. Dodge, et al.

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AUGUST, 1867.

**JAMES KENNEDY, ET AL., v. WILLIAM E.  
DODGE, ET AL.****DAMAGE TO CARGO.—DELIVERY.—NEGLIGENCE OF MASTER IN OVER-  
LOADING PIER.—RECOUPMENT.**

Where a ship arrived in New York, with cargo consigned to respondents, and they had notice of the landing of it, and took part of it away, but before they had removed it all, the master of the ship had overloaded the pier with other goods, and it gave way, and part of the respondents' goods were thrown into the water and damaged; there being an agreement between the shipowners and the respondents by which the former employed a watchman, at respondents' expense, to watch goods that were not removed from the pier, over night; and the shipowners sued the respondents for freight, and the latter set up as a defence the injury to the cargo,

*Held*, That with regard to cargoes arriving at this port under ordinary bills of lading from foreign countries, landing them at a proper time, and upon a proper dock, with notice to the owners, is equivalent to a delivery.

That after such landing and notice, the owner takes all the risks arising from every cause, except that which proceeds from the ship herself.

That the notice to the respondents was not a notice against the wrongful act of the ship in overloading the pier, or against a defective pier.

That the master of the ship was clearly liable for the damage to the cargo, for it was by his act, in overloading the pier, that the goods were injured.

That that act of his was not malicious or intentional, but was committed in the ordinary discharge of his duties as master, and within the scope of his powers as the agent of the owners, and that the ship was liable therefor.

That whether the master had reason to suppose that the pier was not safe or not, was not material.

That the damages to the cargo could be recouped in this suit for freight. But that the respondents could not have an affirmative decree in their favor, if that damage exceeded the freight.

That the injury to the cargo, and the expense incurred in recovering it from the water, were proper items of such damage.

This was a libel *in personam*, brought by the owners of the ship Jeremiah Thompson, to recover the freight money on a considerable quantity of tin plate and iron rods, shipped on board the Thompson at Liverpool, by

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Phelps, James & Co., and consigned to the respondents in New York. The bill of lading was in the ordinary form, and the libel alleged performance of the contract, including the delivery of the goods at this port.

The answer admitted that the goods were shipped as stated, and arrived at this port, but averred that they were not delivered in good order ; that, on the contrary, the cargo of the ship was discharged in such an unskillful and negligent manner, that the dock on which it was placed broke down, and three hundred and thirteen boxes of the tin plate were precipitated into the river and greatly damaged. The answer also averred that the respondents were at great expense in recovering them, which, with the injury to the plates in being immersed in the water, amounted to more than the freight money sued for. The respondents asked to recoup and set off this damage and expense, to the extent of the libellants' claim for freight, and to recover the balance.

For libellants, *Beebe, Dean & Donohue.*

For respondents, *Phelps & Fuller.*

SHIPMAN, J. Before stating and applying the legal principles which must govern this case, it will be proper to state the facts which were developed on the trial. I find the following facts proved :

1. That the ship arrived at this port about the 11th of August, 1866, with a general cargo, including the tin plate and iron rods mentioned in the bill of lading, and also a considerable quantity of pig iron and other freight for other parties.

2. That, on the application of the ship, the harbor-master assigned her a berth at pier No. 45, East River, which she took, and proceeded to unload her cargo, which she continued to do for several days.

3. That the pier was a good one, with sufficient

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strength to have supported the cargo had it been properly placed thereon.

4. That as the cargo was discharged from time to time, the respondents had notice of the landing of that part of it which belonged to them, and took portions of it from time to time to their warehouses, as was convenient.

5. That before they had removed it all, the ship had so overloaded the bridge of the dock with other cargo, and especially with the iron, that it gave way, and precipitated a portion of the respondents' goods into the river.

6. That the goods were thereby damaged, and the respondents incurred expense in recovering them from the water.

7. That by a standing agreement between the ship, or her owners, and the respondents, when the latter had goods on the dock, landed from ships owned by the libellants, and such goods remained on the dock over night, the master or agent of the ship was to employ a night watchman to watch the goods, at the expense of the respondents, and that they did so in this case.

Now, it is insisted by the libellants that these goods were delivered to the respondents when they were placed on the dock with notice to them, and were consequently at their risk thereafter. With regard to cargoes arriving at this port under ordinary bills of lading from foreign countries, landing them at a proper time and upon a proper dock, with notice to the owners, is equivalent to a delivery. After such landing and notice, the owner takes all the risks arising from every other cause except that which proceeds from the ship itself. The parties to this suit evidently recognized this rule of law, when the watchman was employed at the expense of the respondents to watch this tin during the night time. Had this tin been stolen, or removed by other parties without the intervention of the officers or agents of the ship, or damaged by

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the elements, the ship could not have been made responsible.

But this does not meet the question before the court. The clear proof is, that the pier was broken down by the weight of the iron placed upon it by direction of the master. He, and not the respondents, selected the dock, and he broke it down. The fact that the respondents did not instantly remove their goods on their being landed, is no answer. The notice to them was not a notice against the wrongful and destructive acts of the ship in discharging the rest of her cargo, nor against a defective pier. The master had no more right to break the dock down and precipitate this tin into the water, than he would have had to pile his iron on crates of crockery and crush them. I attribute to him no intention to injure the pier or the respondents' goods. I am speaking of the legal, and not the moral quality of his acts. He doubtless thought the dock would support the load he was placing upon it, but the result proved that he was mistaken. The consequences of that mistake are not to fall on the owners of the cargo, when they had no agency in causing it.

The only doubt I have felt in the case is in relation to the responsibility of the ship for the damages. The master is clearly liable, for it was by his act that the goods were injured. There was a constructive delivery, and the question has arisen in my mind, whether, after such constructive delivery, the wrongful act of the master in damaging the goods can be visited on the ship. But this wrongful act was not malicious or intentional on his part, but was one committed in the ordinary discharge of his duties as master, and within the scope of his powers as the agent of the owners. For this I think the ship is liable.

Much stress was, during the hearing, laid on the fact that the master had no notice, nor any reason to suspect that the pier was not perfectly safe, and sufficiently



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strong to support the load he was placing upon it. There is, however, some evidence that he had doubts on this point. But whether he did or not, is not material here. A ship is bound to deliver her cargo in a proper place—that is, a place proper for the amount that is to be landed, and which it is to support at any one time. (*The Majestic*, *Legal Obs.*, p. 100; *Judge Ingersoll's remarks*, p. 105.)\* This dock or place is selected by the ship, and it is for her and not for the owners of the cargo, to see that it is sufficient to support the load that she places upon it, and that the weight of the cargo is properly distributed over the pier, so as to secure its safety.

The only remaining question is, whether the damages of the respondents, arising out of this accident, can be recouped against the claim for freight, and if there is a balance in their favor, whether it can be recovered in this suit.

That the damages suffered by the respondents can be recouped from the freight money, which the libellants would otherwise recover, appears to be settled upon authority. (*Bearse v. Ropes*, 1 *Sprague's Decis.*, 331; *Snow v. Carruth*, *ibid.*, 324; *Thatcher v. McCulloch*, *Olcott Adm.*, 365; *Bradstreet v. Herron*, *Abbott's Adm.*, 209; *Zerega v. Poppe*, *ibid.*, 397.) By way of recoupment, the respondents can, as the damages arise out of the same transaction, extinguish a portion or all the claim of the libellants.

But they can go no further. The court cannot pronounce in their favor for any sum in which their damages may exceed the amount of the libellants' demand. In *Nicholls v. Tremlett*, (1 *Sprague's Decis.*, 367,) the court says: "The admiralty does not take cognizance of pleas in set-off, no statute having given it that authority, and it has been thought by some that a distinct claim by the respondent, founded upon the violation of the con-

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\* I have not found this case in the *Legal Observer*. It is reported on appeal in 3 *Blatch*, 289.—R. D. B.

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tract by the libellant, is in the nature of a set-off, and so not cognizable by this court. But I am of opinion that where the counter-claim is founded upon the same character party, the respondent may set it up in his answer, so that the damages that he has sustained may be recouped from the amount which the libellant might recover. But in this case, if the damages sustained by the respondent should exceed the just claim of the libellant, the court can give no decree for the excess, the utmost effect being to diminish or extinguish the claim of the libellant; nor could the respondent afterward maintain a suit for such excess. He can not be permitted to split up his demand and litigate the same question twice. Having once voluntarily submitted his claim for damages to the court, he must be content with such relief as the tribunal may afford him."

I understand this to be a correct statement of the law both in the admiralty and common law courts. (*Sickles v. Patterson*, 14 *Wend.* 257.) And it follows that this court can render no judgment for the respondents to recover any excess beyond the libellants' just claim.

Had the respondents filed a cross or independent libel they would have recovered their whole damages. But it is too late now. They must content themselves with the diminution or extinguishment of the libellants' just claim.

Let an order be entered referring the case to a commissioner to take the proofs, and report to this court the amount of freight which would be due to the libellants under the bill of lading, and the amount of damage which the respondents have suffered by the injury to their goods from the cause mentioned in the answer, together with the expense which they incurred in recovering it from the water. On the coming in of the report, a final decree will be entered in conformity with the rules laid down in this opinion.

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The Brig Belle.

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AUGUST, 1867.

## THE BRIG BELLE.

**COLLISION BETWEEN SAILING VESSELS OFF BARNEGAT.—CHANGE OF COURSE IN EXTREMIS.—LIGHTS.—BRITISH STATUTE NOT BINDING UPON A BRITISH VESSEL MEETING A VESSEL OF ANOTHER NATION AT SEA.**

Where a British schooner bound to New York, close-hauled on the wind, met an American brig bound out, with the wind free, and kept her course till a collision was imminent, when she ported her helm, but did not avoid the collision; the schooner not having the lights required by the British Merchants' Shipping Act, and the collision having taken place before the passage of the Act of Congress respecting lights on vessels at sea:

*Held*, That it was the duty of the brig to keep out of the way, and of the schooner to hold her course.

That the court will not stop to inquire whether some other manœuvre on the part of the schooner than porting might have proved more successful. The error of a vessel, which has been brought into immediate jeopardy by the fault of another, committed in a moment of alarm, will not subject her to damages or prevent her recovery.

That there is no proof that the failure of the schooner to carry the lights required by the British Merchants' Shipping Act misled the brig, or in any way contributed to the disaster.

That that Act had no application to the equipment or conduct of this British schooner when meeting a foreign ship on the high seas.

Whether it would have an application to collisions between British and American vessels since the passage of the Act of Congress on the same subject—*Quere?*

The facts of this case are stated in the opinion of the court.

For libellants, *A. L. Edwards*.

For claimants, *Beebe, Dean & Donohue*.

SHIPMAN, J. On the evening of the 22d of Novem-

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The Brig Belle.

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ber, 1862, a collision occurred between the schooner Tempest and the brig Belle, off the New Jersey shore, between Barnegat and Sandy Hook. The schooner was sunk. She was insured by the Pacific Mutual Insurance Company. They paid the loss under the policy, and as assignees, subrogated to the rights of the owners of the schooner in the premises, they bring this suit to recover the damages resulting from the collision.

The Tempest was bound from Nassau to New York, and took on board Captain Murray, an experienced Sandy Hook pilot, some time before the collision. He immediately took charge of her navigation, and continued in charge until the accident.

He states that the wind was about N. W. by W., and the schooner close-hauled, with a light at the end of her bowsprit; that he kept her close by the wind. About seven o'clock he discovered the light of an approaching vessel, which proved to be the brig Belle, in the neighborhood of a mile off, coming down the coast, and approaching the Tempest nearly head and head; that he kept his vessel close by the wind until the brig had approached so near that a collision was imminent, when he ordered his wheel hard a-port and attempted to slack off the main sheet, in order, if possible to clear her; but that it was impossible to do so, and that though his wheel was put hard up, the Tempest had fallen off but little, when the Belle struck her stem on, near the port cathead, at an angle of about two points, and cut into her fifteen or twenty feet, knocking out her foremast, and sinking her in a few minutes. I find nothing in the other proofs that, in my judgment, materially shakes the statement of the pilot. On the other hand, I think that the testimony of Captain Yates, of the Belle, when carefully considered, tends to show that there was no material change in the course of either vessel until the Tempest's wheel was put hard a-port. The pilot of the Tempest says there was no change of her course till that time, and

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The Brig Belle.

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if there was any change of the course of the Belle, it was so small as to still leave the vessels approaching each other nearly head and head. The Belle having the wind free, and the Tempest being close-hauled, it was the duty of the former to keep out of the way. This is so well settled that a citation of authorities would be superfluous.

It was equally the duty of the Tempest to hold her course, and allow the Belle to choose which side of her she would pass. She did so, as I understand the proofs, until it became evident that a collision must take place unless something was done. She then ported her helm. Whether some other manœuvre on her part might not have proved more successful, this court will not stop to inquire. The movement was made in a moment of alarm and of imminent and overwhelming peril—peril into which the vessel had been brought by the fault of the Belle and by no fault of the Tempest. The error of a vessel thus brought into immediate jeopardy by the fault of another, committed in a moment of alarm, will not subject her to damages nor prevent her recovery. This is a perfectly familiar principle of constant application by courts of admiralty.

The duty of the Belle was obvious and simple. She discovered the light of the Tempest in ample time to have cleared her. To accomplish this she should have taken such early and decided measures as would prevent both the danger and alarm. She failed to do this, and must be pronounced in fault and responsible for the consequences.

The claimants insist that upon the proofs the Tempest must be regarded as a British vessel, and that as she failed to carry the colored lights prescribed by the Act of Parliament, she can not recover. Assuming that the Tempest was a British vessel, there are two answers to this claim of the defence :

*First.*—There is no proof whatever that the failure to carry the colored lights prescribed by the British Mer-

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The Brig Belle.

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chants' Shipping Act misled the Belle, or in any way contributed to produce the disaster.

*Second.*—The Act of Parliament in question has no application to the equipment or conduct of a British ship when meeting a foreign ship on the high seas, and can furnish no rule by which the merits of a controversy growing out of a collision with a foreign vessel can be tested. This has been repeatedly decided by the English courts.

In the case of the *Saxonia* (1 *Lushington*, 414,) this question was considered, and Dr. Lushington remarked: "When a British and foreign ship meet on the high seas, the usual rule is that the statute is not binding; clearly it is not binding on the foreigner; and if it were considered binding on the British vessel, the British vessel would manifestly be under an undue disadvantage. I believe the practice of applying the maritime law to such cases has been followed universally up to the present moment, and I hold such to be the law." This case was affirmed on appeal by the privy council, the master of the rolls delivering the judgment, in the course of which he says: "We are of opinion that this collision must be considered to have taken place on the high seas, in a place where a foreign vessel has a right of sailing without being bound by any of the provisions of the statutes enacted to govern British ships. This being so, it follows that the Merchants' Shipping Act has no application to this case, as it has been fully determined that where a British and foreign ship meet on the high seas, the statute is not binding upon either. The principle, therefore, by which this case must be decided, must be found in the ordinary rules of the sea." (1 *Lush.* 421, 422.) The same doctrine was laid down by the High Court of Admiralty in the *Dumfries*, (*Swabey*, p. 63,) and in the *Zollverein* (*Swabey*, p. 96.) To the same point is the case of the *Chancellor*, (14 *Moore's P. C.*, 202.) The only case I find in the English reports where a contrary doctrine is held, is

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that of the *Oleadon*. (1 *Lush.* 158.) In this latter case the point seems to have been passed upon without much attention, and without reference to the fact that it had been decided the other way by the High Court of Admiralty. The weight of authority is decidedly in favor of the doctrine that the statute has no application to the case of a British ship meeting a foreign ship on the high seas ; upon principle, I think this is correct.

Of course this exposition of the law refers to the state of things existing on the date of this collision, 1862. Since then, the United States, as well as other nations, has passed laws similar to those of Great Britain, relating to the lights which sailing vessels are bound to carry.

Let a decree be entered for the libellants with an order of reference to a commissioner to compute the damages.

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AUGUST, 1867.

## IN THE MATTER OF WILLIAM D. HILL, A BANKRUPT.

PRACTICE IN BANKRUPTCY.—APPEARANCE OF CREDITORS.—VARIANCE IN NOTICE TO CREDITORS.—MARSHAL'S RETURN.—STATEMENT OF DEBTS AND OF PERSONAL PROPERTY.—PROOF OF DEBT.

At the first meeting of a bankrupt's creditors, an attorney appeared for two creditors who had not proved their claims, and filed four objections to the proceedings, viz. : (1) That the name of the bankrupt, as stated in the notice served on them, was William B. Hill; (2) That the petition did not comply, as to the details required to be stated in it, with the eleventh section of the Bankruptcy Act; (3) That the inventory did not state the items of the bankrupt's personal estate; and (4) That the bankrupt had omitted from his schedule property held by him, or others for his use.

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The bankrupt moved to strike out these objections, among other reasons, because (1) The creditors had not appeared in person, or by an attorney authorized to practice in the United States District or Circuit Courts; (2) The creditors had not proved their claims; (3) The proof of service of notice by the marshal was regular and conclusive; (4) The inventory of debts, and of personal property was sufficient, and the register's certificate that it was so was conclusive. The register did not pass on the questions, because he held that the fourth objection was an "opposition to the bankrupt's discharge," which necessitated a reference to the court. He certified them to the court, and adjourned the proceedings.

*Held*, That the adjournment was regular.

That the fourth objection was not an "opposition to the discharge." Until the bankrupt applies for his discharge, under section twenty-nine, no objection to any proceeding can be considered to be such an opposition.

That the variance in the bankrupt's name in the notice served was not material.

That the marshal's return as to such service is not conclusive.

That the statement, in the schedule, of the sum due any creditor, and of the date of the debt or judgment, was sufficient, and that any insufficient statement might be made sufficient by amendment.

That schedules giving an inventory of the bankrupt's personal estate, but failing to set forth the separate items, were defective, but might be amended.

That the objection to the appearance of the creditors by attorney was not tenable.

That no creditor has any right to be heard at the first meeting, either in person or by attorney, in opposition to any of the proceedings, till he has proved his debt.

That the register's certificate, as to the correctness of the inventory of debts, is not conclusive.

That a creditor who opposes a bankrupt's discharge on the ground of fraud or concealment, must be required to specify the particular matter of which he complains.

In this case, on the day appointed for the first meeting of creditors, two of the creditors of the bankrupt appeared, by Theodoric R. Westbrook, Esquire, as their attorney. They did not appear in person, nor were their debts proved, but Mr. Westbrook filed with the register preliminary objections to the proceedings on behalf of each of the two creditors for whom he appeared. The objections were: (1) That the notices to the creditors gave the name of the debtor as William B. Hill, instead of William D. Hill; (2) That the petition did not state the sum due to each creditor, nor the nature of each debt or demand, nor the true cause and consideration of the indebtedness in each case, and where the same arose, and did not comply, as to the details required to be stated in



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it, with the eleventh section of the Bankruptcy Act ; (3) That the inventory of the estate did not show the items of the debtor's alleged personal estate, and the value at which it was estimated, so that it could be determined whether the property was or was not exempt by law, and that the inventory was insufficient and defective under the requirements of said eleventh section ; (4) That the debtor had omitted from his schedule property, claims, demands, and rights of action, owned by him, or held by others for his use and benefit.

The bankrupt, by a written paper filed with the register, moved to strike out such preliminary objections of the creditors, on the following grounds : (1) That the creditors had not appeared in person, nor by an attorney authorized to practice in the District or Circuit Courts of the United States, who was authorized to appear for them in this matter ; that Mr. Westbrook's name, endorsed on the objections, was not written by him, nor had he appeared in court to sanction its use ; and that he could not delegate to other counsel or attorneys the use of his name, unless he in fact acted as attorney in the case ; (2) That the creditors had not proved their claims, and could raise no objections until they established the fact on their part that they had claims against the bankrupt's estate ; (3) That the first objection on the part of the creditors was frivolous, because the proof of service of notice by the marshal appeared to be regular, and was conclusive, and was, in fact, uncontradicted ; (4) That the second objection on the part of the creditors was frivolous, because the inventory was made for the information of the court and not of the creditors as to the amount and nature of each claim, and the certificate of the register as to its sufficiency was conclusive, and because the inventory was sufficient ; (5) That the third objection on the part of the creditors was frivolous, because value is never certain, and can only be estimated, and the value of the debtor's personal estate was so

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stated ; that a full schedule of household furniture was not required by the Act ; and that the examination of the bankrupt was not intended to be superseded by the inventory ; (6) That the fourth objection on the part of the creditors was frivolous, because it was too indefinite, and that it ought to specify what particular omissions had been made from the schedule. The debtor also asked that the creditors be charged with the costs and expenses of the decision of the objections made by them. It was agreed that the questions thus raised should be submitted to the court, and the case was adjourned.

BLATCHFORD, J. The register states, in his certificate, that he would have assumed to decide the several questions raised, except for the fourth objection raised by the creditors, which seemed to him to go to the merits of the whole proceeding, and to constitute such an "opposition to the discharge" of the bankrupt as necessitated a reference to the court, under the Act and the General Orders.

The fourth objection was, that the debtor had omitted from his schedule property, claims, demands and rights of action, owned by him, or held by others for his use and benefit. This objection can not be regarded as an opposition to the discharge of the bankrupt. Until the bankrupt applies, under section twenty-nine, for his discharge, no objection filed or raised to any proceeding can be considered as an "opposition to the discharge." Besides, under sections thirty and thirty-one, no creditor who has not proved his debt can oppose a discharge. In this case, the creditors have not proved their debts.

The register also states, in his certificate, that if the adjournment of the case by the register was irregular, he assumes that the court may vacate such adjournment under its general powers over the bankrupt, and require an appearance in court.

The adjournment was regular.

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The register also states in his certificate that if he had assumed to decide the first preliminary objection raised by the creditors, he would have held that the variance by the use of the name William *B.* Hill, instead of that of William *D.* Hill, in the notices, was not material, and would not be regarded in law or equity, unless the party had been misled; that it is evident that the creditors who appear and raise the objection were not misled; that all the papers in the case, and the notices published in the newspapers, gave the bankrupt's name correctly; and that only the notices served on the creditors who appeared gave the middle letter of the bankrupt's name as *B.*, instead of *D.*

The variance in this case was not material, and the first objection taken by the creditors was untenable.

The register states that he does not regard the return by the marshal, as to the service of notice on the creditors, as conclusive.

Under sections twelve and thirteen of the Act, such return is not conclusive.

The register states, as to the second objection taken by the creditors, that he should have regarded the statement, in the schedule, of the amount due to each creditor, as sufficient, wherever the sum and the date of the debt or judgment was given; that, to ascertain the exact amount, at any stage of the proceedings, only required a computation of interest; that any other mode is impracticable, with the form of schedules adopted by the court; that the details of place and consideration seem to be sufficient; and that, if they are not, they may be made so by amendment.

The views of the register, as to the second objection, are correct.

The register states, as to the third objection, that he is of opinion that the schedules are defective in giving an inventory of the bankrupt's alleged personal estate, because they do not set forth the separate items of house-

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hold furniture and wearing apparel, but that the omission may be remedied by amendment, if necessary.

The schedules are defective, if they do not set forth such separate items ; but the omission may be remedied by amendment, under section twenty-six of the Act, and rules seven, fourteen and thirty-three of the "General Orders in Bankruptcy."

The register states that the point made by the bankrupt against the appearance of the creditors named, did not seem tenable ; that William Lawton, Esquire, first appeared for the creditors named, and that, the objection being taken that he was not admitted to practice in this court, he called in Mr. Westbrook, who represented the creditors named, for Mr. Lawton.

The register is correct in his view that this point is not tenable. Mr. Westbrook being an attorney or counsellor of the Circuit or District Court, has a right, under rule three of the "General Orders in Bankruptcy," to appear for the creditors, and conduct the proceedings for them, and, if he so appears to conduct the proceedings, the register cannot, at the instance of the bankrupt, inquire into the authority given to him by the creditors. The certificate of the register that Mr. Westbrook was called in and represented the creditors, is understood to mean that he appeared and conducted the proceedings for the creditors.

As to the second point made by the bankrupt, namely, that the creditors had not proved their claims, and could raise no objections until they established the fact, on their part, that they had claims against the bankrupt's estate, the register states it to be his opinion, that persons named as creditors in the debtor's schedule, may appear and make any motion, and take any exception, without other proof of their debts than that contained in the bankrupt's papers.

In this the register is mistaken. Under section thirteen of the Act, the two creditors in this case, not

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having proved their debts, would not, at the meeting at which the proceedings now certified took place, have been entitled to any voice or vote in the choice of an assignee. The meeting was, under section eleven of the Act and the warrant, form number six, a meeting of the creditors "to prove their debts, and choose one or more assignees." No creditor has, at such meeting, any right to be heard, either in person or by attorney, in opposition to any of the proceedings, until he has proved his debt. The fact that his debt is set forth in the schedules to the bankrupt's petition, gives him no such right to be heard.

As to the fourth point taken by the bankrupt, the register states that he does not regard his certificate as to the sufficiency of the inventory of the debtor's debts as conclusive.

Such certificate is not so conclusive as to prevent an inquiry into the sufficiency of such inventory, when the question is raised at the proper time and in the proper manner, and on the suggestion of a proper party.

The register states that the fifth point taken by the bankrupt is argumentative.

It is untenable, except in so far as it claims that a full schedule of household furniture is not required by the Act, and in that respect the views of the court have been herein before stated.

As to the sixth point taken by the bankrupt, the register states that he thinks it well taken, and that the creditor who opposes a bankrupt's discharge on the ground of fraud or concealment, should be required to specify the particular matter of which he complains.

The objection made to the fourth objection taken by the creditors would, in any event, be of no avail, unless made definite by specifying the particular omissions relied on.

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The Steamship Louisiana.

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AUGUST, 1867.

## THE STEAMSHIP LOUISIANA.

## PRACTICE IN ADMIRALTY.—ISSUING COMMISSION.—ORAL EXAMINATION.

Where witnesses on the part of a vessel libelled for collision were brought to New York, and their depositions might have been taken before their departure, but were not, and the claimants afterwards, learning that they would not return to New York, applied for a commission to England to examine them, but failed to comply with rules 105, 106, and 107 of this court in making the motion, and the libellants were willing to waive the objection of irregularity in the motion, on condition that they might be allowed, in addition to putting written cross interrogations, to cross-examine the witnesses orally:

*Held*, That the oral examination of witnesses on a commission is eminently conducive to a true understanding of the facts of a case, especially a collision case. That to order such an examination is not a new practice, and is within the power of the court.

That this was a proper case for making an order for such oral examination.

BLATCHFORD, J. This is a motion for a commission to examine at Liverpool, England, on written interrogatories and cross interrogatories to be annexed to the commission, such witnesses for the claimants as may be brought before the commissioner. The libel is filed to recover damages for a collision between the Prussian bark Louisa and the British steamship Louisiana, at sea. The moving affidavit does not disclose the name of any witness proposed to be examined, further than to say that the claimants desire to examine "Richard Mills and others, late composing part of the crew of the steamship Louisiana," nor does it state any fact expected to be proved by any of the witnesses. Besides, the affidavit for the motion is not made by any of the claimants or by their proctor, but is made by the advocate for the claimants, and no excuse is given for this. In these particulars, rules 106 and 107 of this court are violated. So, also, rule 105 is violated by the delay in making this mo-

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The Steamship Louisiana.

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tion. The libel was filed April 27th, 1867, and the answer June 4th, 1867. The affidavit for this motion was not made until August 2d, 1867, and no excuse is shown for a non-compliance with rule 105 as to the time of making this motion. It must be understood hereafter, that the rules prescribed by the court for the conduct of its practice, must be strictly observed, or a satisfactory excuse be furnished for not observing them. In this case, the marked violation of rules 106 and 107 would be a sufficient ground for denying the present motion, were it not that the libellants express a willingness to waive the benefit of those rules, on condition that the granting of the commission be accompanied with certain restrictions. Mills was the second officer of the Louisiana, and he and the others whose testimony is sought, were brought to the port of New York in the Louisiana immediately after the collision. Their depositions might have been taken here *de bene esse*. The only excuse offered for not doing this is, that the proctor and the advocate for the claimants advised them that it was better to postpone the examination of those witnesses until after the witnesses for the libellants should be examined, and that they must be sent back to New York. The claimants did, in fact, take at New York, *de bene esse*, the depositions of four of the officers of the Louisiana who were on board of her at the time of the collision. It is now announced that the witnesses in question will not return to New York before the trial of the case. Under these circumstances, the libellants express a willingness to waive their objections to the granting of the motion, provided they be allowed, in addition to putting written cross interrogatories to the witnesses, to cross-examine them orally under the commission. Such a practice is one eminently conducive to a true understanding of the facts of a case, particularly a collision case, where the witnesses on board of the two colliding vessels scarcely ever agree as to the circumstances attending the collision. It is a

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practice which is not new (*Clayton v. Yarrington*, 16 *Abbott's Pr. Rep.*, 273, note); and, being one calculated to promote the dispensation of justice, it ought to be observed in a proper case. This court has full control over the mode of procedure to be observed in executing commissions for the taking of testimony. (*Benedict's Adm. Pr.*, § 531; *Betts' Adm. Pr.*, p. 86, *et seq.*) In the present case, the neglect of the claimants to examine the witnesses orally in New York, when they had an opportunity of doing so, in which event the libellants would have enjoyed the privilege of orally cross-examining such witnesses, ought not to be allowed to work a possible benefit to the claimants or a possible injury to the libellants. Let an order be entered for the issuing of a commission for the examination, before the United States consul at Liverpool, of such witnesses on the part of the claimants as shall be named in the commission, on written interrogatories and cross interrogatories to be annexed to the commission, the libellants to be at liberty, in addition, to cross-examine such witnesses orally by counsel before the commissioner, the commission to contain a direction to the commissioner to take and reduce to writing such oral cross-examination, and to certify and return it with the commission.

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AUGUST, 1867.

IN THE MATTER OF WILLIAM H. KNOEPFEL,  
A BANKRUPT.

APPEARANCE OF CREDITORS.—POWER OF ATTORNEY.—EVIDENCE.

Where an attorney claimed to act for a firm at the first meeting of the creditors of a bankrupt, under a letter of attorney executed for the firm, all the members of which were in Europe, by one K. as attorney for the firm, but K's attor-



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neyship was not proved by the oath of any witness, nor was any power of attorney to him produced, but he had verified the proof of debt, swearing that he was duly authorized to make the affidavit :

*Held*, That the authority of K. to give the letter of attorney was not sufficiently established to entitle the attorney to appear for the firm under the twenty-third section of the Bankruptcy Act.

BLATCHFORD, J. In this case, at the first meeting of creditors, Mr. G. A. Seixas claimed to act as the "duly constituted attorney" of Loeschigk, Wesendonck & Co., (a copartnership creditor of the bankrupt, which had proved its debt), in the choice of an assignee. Mr. Seixas presented a letter of attorney, drawn according to form No. 14 of the forms specified in the schedules annexed to the "General Orders in Bankruptcy," executed and acknowledged before a register by Gustavus Kutter, as attorney for the copartnership; but the attorneyship of Kutter was not proved by the oath of any person, nor was any power of attorney from the copartnership to Kutter produced. The debt of the copartnership was proved by Kutter. His deposition, in proof of the debt, according to form No. 25, contained the following averment: "that he, this deponent, is duly authorized by his principals to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated," &c., &c. The individual members of the copartnership all of them reside in Europe. The letter of attorney to Seixas was subscribed "Loeschigk, Wesendonck & Co., by G. Kutter," and was sealed, and was certified by a register, to the effect, that before him had appeared Gustavus Kutter, to him known, and known to him "to be the authorized agent of the firm of Loeschigk, Wesendonck & Co., the individuals described in and who executed the foregoing letter of attorney, and acknowledged that he executed the same, as the authorized agent of the said firm, and by their authority, and on behalf of said firm." Mr. Seixas claimed, before the register, that the proof of debt

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made by Kutter on behalf of the firm should be taken into consideration, in connection with the certificate of acknowledgement on the letter of attorney, for the purpose of showing Kutter's authority to duly constitute Seixas the attorney of the firm, to appear and act for it in all respects, including the voting in the choice of an assignee.

The register decided, that the letter of attorney did not give to Seixas the authority which he claimed, because there was no evidence that Kutter held any power from the firm under which he could effectually give the letter; that, by his oath on proving the claim, he had sworn that he was duly authorized to make that affidavit, not to execute letters of attorney, and that the mere acknowledgment of Kutter that he executed the letter of attorney as the authorized agent of the firm, and the register's certificate of his personal knowledge of the identity of Kutter, did not supply the place of proof, by legal evidence, that Kutter was authorized to constitute Seixas the attorney of the firm, to act for it at the meeting, so as to make Seixas the "duly constituted attorney" of the firm, under the twenty-third section of the Bankruptcy Act, which provides, that "any creditor may act at all meetings by his duly constituted attorney, the same as though personally present." Thereupon, the question was, at the request of Mr. Seixas, certified to the judge for his decision.

The decision of the register was correct.

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In the Matter of Julius Heys, a Bankrupt.

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AUGUST, 1867.

**IN THE MATTER OF JULIUS HEYS, A  
BANKRUPT.****BANKRUPTCY PRACTICE.—TIME OF NOTICE OF FIRST MEETING.**

Where all the creditors of a bankrupt resided in Germany, and the register fixed the first meeting of creditors at sixty days from the date of the warrant:

*Held*, That, under the eleventh section of the Bankruptcy Act, the fixing of the time for the first meeting is a matter of discretion with the register.

That ninety days' time is to be allowed in cases where the creditors live so far away as to make such an interval a reasonable time.

That there is nothing to show that the register did not exercise his discretion wisely in this case.

In this case, all the creditors of the petitioner, some eight or ten in number, were foreigners residing in Germany. On the return day named in the order of reference, the petitioner requested the register to fix a day twenty days from such return day, as the day for the first meeting of creditors. The register decided that sixty days time from the date of the warrant, when issued, was the shortest time that could reasonably be named in the warrant for the first meeting of creditors, and that notices should be sent by mail to the creditors by the messenger, properly directed, and with the foreign postage prepaid. The petitioner contended, that the clause in the eleventh section of the Bankruptcy Act, concerning service of notice on creditors by mail or personally, refers only to creditors residing within the United States, and that creditors residing out of the United States are, under that section, to be notified constructively, by the publication of notice in the newspapers specified in the warrant. On the application of the petitioner, the register certified the proceedings to the judge, for his decision thereon.

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In the Matter of Julius Heys, a Bankrupt.

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BLATCHFORD, J. The register was correct in his decision. The eleventh section of the Act requires that the warrant shall authorize the messenger to publish notices in such newspapers as the warrant specifies, and to serve written or printed notice, by mail or personally, on *all* creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor. The same section then goes on to specify what particulars the notice so to be served shall state. One of those particulars is, that a meeting of the creditors of the debtor will be held "at a time and place designated in the warrant, not less than ten nor more than *ninety* days after the issuing of the same." This allowance of as much time as ninety days, in connection with the absolute requirement that notice shall be served, by mail or personally, on *all* creditors, shows clearly that it was the intention of Congress, that as much as ninety days' time between the issuing of the warrant and the first meeting of creditors shall be allowed in cases where the creditors reside so far away as to make such an interval a reasonable one. The fixing of the time is a matter of discretion, which it was the province of the register to exercise in this case, and there is nothing to show that he did not exercise it wisely in fixing sixty days' time.

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In the Matter of Patrick C. Devlin and John Hagan, Bankrupts.

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AUGUST, 1867.

**IN THE MATTER OF PATRICK C. DEVLIN  
AND JOHN HAGAN, BANKRUPTS.****BANKRUPTCY PRACTICE.—TIME OF NOTICE OF FIRST MEETING.—  
PUBLICATION.**

Where a warrant in bankruptcy was issued July 10th, the first meeting of creditors being fixed for July 24th, and, on the 24th, the marshal made return of due publication of notice, the first publication being on July 15th, and of due mailing of notices on that day, and thereupon the register adjourned the meeting to August 8th, and directed a new notice to be given by the marshal, as required in the warrant, of such adjourned meeting, and, on August 8th, the marshal returned that he had, on July 29th, mailed notices to the creditors, but did not return that any further publication had been made, and the register thereupon certified to the court the questions (1) whether the publication for the first return day of the warrant was sufficient, and (2) whether it was necessary to publish again for the adjourned day :

*Held*, That the publication for the first day was not sufficient, the meaning of the eleventh section of the Bankrupt Act being, that the notices shall be served and the publication be completed before the commencement of the ten days immediately preceding the return day of the warrant.

That, there having been no proper publication and service of notice, it was proper for the register to adjourn the meeting.

That the word "given," in the twelfth section of the Act, means *published* as well as *served*.

That, as the notice had not been properly published at the time of the second meeting, it was proper for the register to again adjourn the meeting and direct notice to be published as above stated, the service on the creditors having been properly made and standing good.

That, if the publication had been good for the first return day, it would not have been necessary to publish again, but only to have required new service of the notices on the creditors.

In this case, the warrant in bankruptcy was issued July 10th, 1867, the first meeting of creditors being fixed for July 24th. On that day, the marshal returned, that, by virtue of the warrant, he had caused the notice therein ordered to be published twice in each of the newspapers

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specified, the first publication having been on the 15th of July, and that, on July 15th, he mailed copies of the notice, as required by the warrant. The register, deeming that notice to the creditors had not been given ten days before the meeting, adjourned it to August 8th, and directed that a new notice should be given by the marshal, as required in the warrant, of the meeting to be held on August 8th. On that day, the marshal returned, that he had mailed notices to the creditors on the 29th of July. The return did not show that any further publication had been made of the notice. On these facts the register certified that the following questions arose: 1. Whether the publication of the notices in the newspapers named, within the period of ten days immediately preceding the return day of the warrant, was sufficient publication, within the meaning of the Act; 2. If such publication was sufficient for the first return day, was it necessary again to publish for the adjourned day or second return day, in addition to the mailing or personal service of notices to creditors?

BLATCHFORD, J. The publication of the notices in the newspapers named, within the period of ten days immediately preceding the return day of the warrant, was not sufficient publication, within the meaning of the Act. The eleventh section of the Act requires that the warrant to the marshal shall authorize him *forthwith* to publish notices in the newspapers specified and to serve notice, by mail or personally, on the creditors and the other persons specified, and that the notice shall state that a meeting of the creditors, to prove their debts and choose one or more assignees, will be held at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same. The warrant, form No. 6, directs that the first publication of the notice shall be made *forthwith*, and that the notice shall be served on the creditors *forthwith* and at

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In the Matter of Patrick C. Devlin and John Hagan, Bankrupts.

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least ten days before the appointed meeting. The good sense of all this is, that the publication must be commenced and the notices be served as soon as conveniently practicable after the issuing of the warrant; but that, at all events, to make the proceedings regular, the publications must be completed before the commencement of the period of ten days immediately preceding the return day of the warrant, and the notices must be served on the creditors before the commencement of such period of ten days.

In the present case, there had been, at the time of the meeting of July 24th, 1867, no proper publication of notice, and no proper service of notice. Under section twelve of the Act, it was, therefore, proper for the register to adjourn the meeting to a day and hour to be then and there fixed by him, and to direct that a new notice should be given by the marshal, as required in the warrant, that the meeting of the creditors would be held on such adjourned day and hour. The twelfth section says, that if, at the meeting held in pursuance of the notice, it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required. The expression, "notice to the creditors," in this twelfth section, means the notice required by the eleventh section to be published, as well as the notice required by that section to be served; and the word "given," wherever used in the twelfth section, means *published* as well as *served*.

On the adjourned day, the 8th of August, 1867, it appeared that the necessary notice to the creditors had been served as required, that is, ten days before the adjourned meeting, but it did not appear that the notice had been properly published. On such adjourned day, it was proper for the register to again adjourn the meeting, and direct the notice to be published, the publication to be completed at least ten days before the new adjourned day, the service on the creditors having been

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In the Matter of John Edward Cline, on Habeas Corpus.

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properly made and standing good. If the publication had been sufficient for the first return day, it would not have been necessary to publish again for the first adjourned day, or for the second return day; but it would only have been necessary, if the service on the creditors had not been properly made in time before the first return day, to require the service of new notice on the creditors.

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AUGUST, 1867.

## IN THE MATTER OF JOHN EDWARD CLINE, ON HABEAS CORPUS.

ENLISTMENT OF MINOR.—HIS OATH AS TO HIS AGE CONCLUSIVE.—  
POWER OF ARMY OFFICER TO ADMINISTER THE OATH.—BURDEN  
OF PROOF.—PRESUMPTION.

Under the Act of Congress of February 13th, 1862, the oath of a military recruit, in his enlistment papers, as to his age, is conclusive upon himself and upon this court, and, where he has sworn that he was not a minor, evidence to show that he was such is not admissible.

Where the oath is taken before a military officer, the presumption is that the services of a civil magistrate could not be obtained, as required by the Act of June 12th, 1858, § 3, and the burden of proof is on the recruit to show that such services could be obtained.

This was a *habeas corpus* issued on the petition of John Edward Cline, a private soldier in the army of the United States, held therein by virtue of his enlistment. The petition set forth that, at the time of his enlistment, Cline was a minor, and enlisted without the consent of his parents.

The return to the writ, made by Brevet Major-General Daniel Butterfield, General Superintendent of the recruiting service, set forth, that Oline was regularly



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enlisted into the service of the United States, according to the laws thereof governing the enlistment of recruits, by his signing the proper statement or declaration required for recruits to take; that the oath of enlistment was regularly administered by an officer of the army authorized to administer oaths; and that the recruit was regularly examined by the surgeon appointed for that purpose.

A certified copy of the original enlistment paper was annexed to the return, and such original was submitted to the court with the return.

This paper consisted of four documents:

1. The statement or declaration required to be made by recruits.

2. The certificate of the examining surgeon.

3. The certificate of the recruiting officer, J. Christopher, Capt. 25th U. S. Infantry, and Brevet Major U. S. A.

4. An affidavit signed by Cline, and certified to have been sworn and subscribed to at Chicago, Illinois, May 20th, 1867, before Major Christopher, and reading as follows:

“Oath of Recruit—I, John E. Cline, desiring to enlist in the army of the United States for the term of three years, do solemnly swear that I am twenty-two years and — months of age; that I have neither wife nor child; that I have never been discharged from the United States service on account of disability or by sentence of a court-martial, or by order before the expiration of the term of enlistment; and I know of no impediment to my serving honestly and faithfully as a soldier for three years.”

It was claimed, on the part of Cline, that, being enlisted while a minor, without the consent of his parents, his enlistment was unlawful, and that he was entitled to be discharged.

Testimony satisfactorily establishing the facts that he

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was a minor and enlisted without the consent of his parents was received, by the court provisionally, on the hearing of the writ, subject to a decision by the court as to the admissibility of such testimony.

*Dudley Field* and *Thos. G. Shearman*, for petitioner.

*Lieut. A. B. Gardner*, 9th Infantry, for respondent.

BLATCHFORD, J. It is not contended that, if the soldier was twenty-one years of age when he was enlisted, his enlistment was in any manner illegal, but his discharge is sought solely on the ground that he was in fact under twenty-one years of age, and was enlisted without the consent of his parents.

The Act of February 13th, 1862, (12 *U. S. Stat. at Large*, 339, § 2,) provides, that "the oath of enlistment taken by the recruit shall be conclusive as to his age." It is as conclusive and binding upon this court as it is upon the recruit or upon the United States. The intent of Congress manifestly was, that no evidence should be received to contradict a statement as to the age of the recruit, contained in the oath taken by him on his enlistment. This view of the Act of 1862 was taken by Judge Daly, in the case of George Reilly, in the Court of Common Pleas, in the city of New York, in March, 1867, and also by my predecessor, Judge Betts, in January, 1867, in the cases of Michael J. Conley and John Jump. I am entirely satisfied that the view is a sound one. In the present case Cline swore, in his oath of enlistment, that he was then twenty-two years of age. That oath is conclusive that he was not then a minor, and no evidence is admissible to show that he was.

An objection is taken to the validity of the enlistment of Cline, on the ground that the Act of June 12th, 1858, section three, does not authorize an officer of the army to administer the oath of enlistment to a recruit unless the services of a civil magistrate authorized to administer

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the same cannot be obtained ; that the Act of August 3d, 1831, section eleven, does not authorize an officer of the army to administer an oath of allegiance, unless it appears that he could not obtain the attendance of a civil officer authorized by law to administer oaths ; and that the return should show that the attendance of such civil officer could not be obtained. It is a sufficient answer to this objection to say, that the presumption is in favor of the regularity of the proceeding, when it appears that the oath was administered by the military officer, and that, in such case, the intendment is, that the services of a civil magistrate could not be obtained, and the burden is upon the recruit to show that such services could be obtained, and not upon the United States to show that they could not be obtained. In this case, nothing appears on the subject except what is shown on the face of the enlistment papers.

The enlistment of Cline was, in all respects, regular, and he must be remanded to service under his proper military officer.

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AUGUST, 1867.

## IN THE MATTER OF JAMES STOKES, JR., ON HABEAS CORPUS.

### ENLISTMENT OF MINOR.—EVIDENCE.

On a *habeas corpus* to inquire into the enlistment of an alleged minor, who had sworn, on his enlistment, that he was twenty-one years of age and upwards, evidence may be given as to whether he understood what he was swearing to.

BLATCHFORD, J. This case is substantially the same as that of Cline, just decided by me. Stokes is a private soldier, who enlisted in the army of the United States, at

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In the Matter of G. & H. Pupke, Involuntary Bankrupts.

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New York, July 23d, 1867. His enlistment papers are, in substance, of the same character as those of Cline. His age is stated in them as being twenty-one years and four months, and he swears, in his oath of enlistment, "that he is over twenty-one years old." On the hearing, on the return to the writ, it was alleged that Stokes had, in fact, on his enlistment, stated his age to be only eighteen years, and had not understood that he was swearing he was twenty-one years old, and that the oath which he signed and swore to was not read or explained to him. I allowed evidence to be given on that point, and am entirely satisfied that the proceedings in enlisting him were carefully conducted, and that he stated that he was twenty-one years and four months old, and was willing to swear to it, and that he understood fully that he was required to swear to his age, and knew that he was swearing that he was over twenty-one years of age. For the reasons stated in the case of Cline, the oath taken by Stokes, on his enlistment, as to his age, is conclusive on that point. As his enlistment was, in all respects, regular, he must be remanded to service.

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AUGUST, 1867.

IN THE MATTER OF G. & H. PUPKE, INVOL-  
UNTARY BANKRUPTS.

BANKRUPTCY PRACTICE.—DEMANDING JURY.—ADJOURNMENT.

Whether, in proceedings in involuntary bankruptcy, a jury can be demanded on any day but the return day, *quere*.

By consent of parties, an adjourned day may be held to be the same as the return day.

This was a case of involuntary bankruptcy. On the return day, Mr. A. F. Smith, who appeared in behalf of

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the debtors, stated to the court that arrangements were being made for a compromise of the matter, to carry out which it had been agreed that the proceeding should be adjourned, but, if the compromise should fall through, he should want a jury; and he inquired of the court whether he would, under the Act, have the same right to demand a jury on the adjourned day, as on this the return day.

Judge Blatchford, after looking at the statute, expressed some doubt whether a jury could be demanded on any day but the return day. But the counsel for the petitioning creditor saying that he had no objection, the Judge ordered the case to be adjourned, making it a part of the order, that the adjournment was to be "with like effect, in all respects, as if that day were the return day of the order, instead of this day."

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AUGUST, 1867.

## THE BRIG ANTELOPE.

## SETTING ASIDE DEFAULT.—WAIVER.—CANCELLING STIPULATIONS.—PRACTICE.

Where a libel was dismissed by default in 1860, and the claimant, without notice to the libellant, entered an order, in 1861, cancelling the stipulation for costs and the bond under the Act given on the discharge of the vessel, but thereafter agreed to open the default, and the cause was, in 1864, noticed for hearing by both parties, but, when it was called for hearing, in March, 1864, the claimant's proctor stated that it had been dismissed, and thereupon the libellant's proctor moved to set aside the decree and the order of cancellation, which motion was adjourned by consent till the present time:

*Held*, That the claimant was regular in entering the order of cancellation without notice to the libellant, the libel having been dismissed by default.

That the claimant had, by his acts, waived the decree dismissing the libel and the order of cancellation.

That the court had power to vacate that decree and order, so as to hold the stipulators still liable on their stipulations.

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This was a motion to set aside a decree entered in October, 1860, dismissing the libel in this case, and an order entered in January, 1861, cancelling the bond given on the discharge of the vessel, and to set the cause down for trial. The libel was filed in October, 1855, to recover for spars furnished to the vessel on the order of her owner while she was being built by him, and used in building her, of the value of \$415. A claim and a stipulation for costs and a bond under the Act of Congress, in double the amount claimed, were filed, and the vessel was discharged from custody. The claimant filed an answer, and, in March, 1859, the cause being on the calendar, was called in its order, and, the libellant not appearing, a decree was made dismissing the libel, with costs. This disposition of the case was made, it was said on the motion, because of the decision made by the Supreme Court at the December Term, 1857, in the case of *The People's Ferry Co. v. Beers* (20 Howard, 393), and of the rule adopted by the Supreme Court at the December Term, 1858, as the result of the case of *Maguire v. Card* (21 Howard, 251), and because it was thought that, under the principle of that rule, taking away from District Courts the right of proceeding *in rem* against a domestic vessel for supplies or repairs in virtue of a lien given therefor by State laws, no recovery could be had in this suit. But, notwithstanding this decree, the case was noticed and put upon the calendar by the claimant for the October Term, 1860, and, on the 5th of October, 1860, the libel was again dismissed with costs, the libellant not appearing, and a decree to that effect was entered. On the 26th of January, 1861, an order was entered, on motion of the claimant, reciting that the libel had been dismissed by default, and that more than ten days had elapsed since the decree, and no subsequent proceedings had been taken on the part of the libellant, and ordering that the stipulations executed on the part of the claimant be cancelled. This order was entered as an

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order of course and without notice to the libellant. No notice or copy of the decree dismissing the libel, and no notice or copy of the order of January 26th, 1861, was served on the libellant's proctors. The clerk's costs were taxed January 26th, 1861, and the taxed bill was filed the same day, but the taxation was without previous notice to the libellant, so far as appeared. The bill of costs was served on the libellant's proctor, and he, immediately on receiving it, requested the claimant's proctor to open the default and withdraw the bill of costs, and was told, in reply, that he might consider the bill of costs withdrawn and the default opened. In February, 1864, the libellant's proctor informed the claimant's proctor that the cause would be noticed for the March Term, 1864, and each party served a notice of trial on the other party in the suit, for the March Term, 1864. The originals of these notices were produced to the court, that is, the one served by the claimant's proctor on the libellant's proctor, and a copy of the one served by the libellant's proctor on the claimant's proctor, the latter having upon it an admission of service by the claimant's proctor, dated February 16th, 1864. The cause being on the calendar for the March Term, 1864, was called for trial, when the claimant's proctor stated to the court that the libel had been dismissed by default. The case then stood over, and this motion was noticed for the 29th of March, 1864, and had been postponed by consent from that time until now.

For libellant, *A. F. Smith.*

For claimant, *W. R. Beebe.*

BLATCHFORD, J. It is claimed, on the part of the libellant, that, under the decision of the Supreme Court in the case of *The Steamer St. Lawrence* (1 Black, 522), this court has jurisdiction of this case, and that the libellant ought to have an opportunity to try the case on its merits.

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It is urged that it was irregular to enter the order of January, 1861, as an order of course, and without notice of a motion for leave to enter it; but I am of opinion that the proceedings on the part of the claimant were regular. After he took the decree in October, 1860, dismissing the libel by default for want of the appearance of the libellant when the case was called for trial, it was regular for him to enter without notice an order of course cancelling the stipulations executed on the part of the claimant. Such an order followed of course the dismissal of a libel, and it did not require any special fiat of the court or the judge, or any signature of the judge to the order, or any notice, to authorize its entry. Under rule 145 of this court in Admiralty, where proceedings on a decree are not stayed by an appeal, and the decree is not satisfied in ten days after notice to the proctor of the party against whom it is rendered, an order that the sureties of such party cause the engagement of their stipulation to be performed, or show cause why execution should not issue, is an order of course. In view of this practice and of the fact that, where a libel is dismissed, the whole foundation and support of the stipulations is gone, and they fall with the libel as a matter of course, there is no reason why an order cancelling the stipulations should not be an order of course.

But I think that the claimant, by his conduct, followed up by his noticing the cause for trial for the March Term, 1864, waived the decree of October, 1860, dismissing the libel, and the order of January, 1861. The only question as to which I have had any hesitation has been, whether the claimant could thus practically assent to the reinstatement of the cause, so as to affect the sureties in the stipulations, and hold them to their liability after the dismissal of the libel, and whether the court could now vacate the decree and the order, so as to hold the sureties still liable on their stipulations. Unless that can be done, the remedy to the libellant is practically



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worthless. The point, however, is settled by the decision of the Supreme Court in the case of *The Palmyra*, (12 *Wheaton*, 1, 9). In that case, the Supreme Court dismissed an appeal, and afterwards ordered the case to be reinstated. It was contended that the court had no authority to reinstate the case after such a dismissal, because it might operate to the prejudice of the stipulators or sureties to whom the vessel was delivered upon stipulation in the court below. The court, Mr. Justice Story delivering its opinion, overruled the objection and said: "Whenever a stipulation is taken, in an Admiralty suit, for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators liable to the exercise of all those authorities on the part of the court which it could properly exercise if the thing itself were still in its custody. This is the known course of the Admiralty. It is quite a different question whether the court will, in particular cases, exercise its authority where sureties on the stipulation may be affected injuriously. That is a subject addressed to its sound discretion." "Every court must be presumed to exercise those powers belonging to it, which are necessary for the promotion of public justice, and we do not doubt this court possesses the power to reinstate any cause dismissed by mistake. The reinstatement of the cause was founded, in the opinion of this court, upon the plain principles of justice and according to the known practice of other judicial tribunals in like cases." This court has, therefore, clearly the power to reinstate this case. It was dismissed on the idea that the Supreme Court had decided that this court had no jurisdiction of such a case. The libellant now claims that the Supreme Court has decided otherwise. He is entitled to try the case and to maintain the jurisdiction of this court if he can, and he cannot try the case unless it be reinstated. The mistake made by the libellant in allowing the case to be dismissed

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In the Matter of James W. Seymour, on Habeas Corpus.

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by default, was indeed a mistake of law, and the case would have been in a different position if the claimant had not waived as he did the decree and the order, and, but for such waiver, the court might have been constrained to deny any relief to the libellant. Nor is it shown that the sureties will be affected any more injuriously than sureties in any case who may be compelled to respond for their principal. The court acts on the matter as if the vessel were still in its custody. The result is that the case is a proper one for granting to the libellant the relief asked for.

Motion granted.

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AUGUST, 1867.

## IN THE MATTER OF JAMES W. SEYMOUR, ON HABEAS CORPUS.

HABEAS CORPUS.—FRAUDULENT DEBT.—PENDENCY OF BANKRUPTCY PROCEEDINGS.—DISCHARGE FROM ARREST UNDER STATE AUTHORITY.

Where R., a merchant in New York, deposited goods with S., a merchant in New Orleans, for sale on commission, and S. sold them, but made no returns, and thereupon R. commenced a suit against S. in the Superior Court of the city of New York, and obtained an order of arrest, under which S. was arrested, and, after trial and judgment against him, S. was held by the sheriff under an execution issued against his person on the judgment, and, having filed his petition in bankruptcy before the District Court in Louisiana, now applied to this court and obtained a writ of *habeas corpus*, and also presented a petition praying that he might be discharged from imprisonment pending the bankruptcy proceedings, and that all proceedings in the State court against him might be stayed, pending such proceedings, and the return to the writ and the answer to the petition showed the above facts:

*Held*, That, under the twenty-sixth section of the Bankruptcy Act, a bankrupt may, notwithstanding the pendency of proceedings in bankruptcy by or against him, be held under arrest in a civil action, if it is founded on a debt or claim from which his discharge in bankruptcy would not release him.

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That, under that Act, no debt created by the defalcation of a bankrupt, while acting in any fiduciary capacity, will be discharged.

That the debt contracted by S. was contracted by his defalcation while acting in a fiduciary capacity.

That it was, therefore, a debt which, under the thirty-third section of the Act, would not be released by his discharge in bankruptcy.

That the twenty-first section\* of the Bankruptcy Act does not apply to any suit brought to collect or enforce or satisfy any debt which would not be discharged by a discharge under the Act.

That the twenty-seventh rule of the General Orders in Bankruptcy applies only to the court in which the bankruptcy proceedings are pending, and, therefore, does not apply to this court in this case.

That if S. was held by the State court in violation of any law of the United States, this court would have power to release him on *habeas corpus*, under the Act of February 5th, 1867.

This case came up on a writ of *habeas corpus* issued, on the petition of James W. Seymour, to the sheriff of the city and county of New York, in whose custody he was held. The sheriff returned to the writ, that he arrested Seymour and took him into custody on the 3d of September, 1866, by virtue of an order of arrest issued by a justice of the Superior Court of the city of New York, under the Code of Procedure of the State of New York, in a civil action in that court, wherein Constantine Rosswog was plaintiff and the petitioner was defendant; that Seymour remained in his custody under said order until the 22d of September, 1866, when he was discharged on bail; that, on the 3d of July, 1867, his bail surrendered him into the custody of said sheriff, in exoneration of themselves as his bail; that the sheriff, thereupon received and thereafter held and detained Seymour in his custody by virtue of such surrender; that, on the 20th of July, 1867, an execution against the person of Seymour in said action was duly issued to said sheriff, and that the debt em-

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\* In the case of *Rosenburg*, decided in November, 1868, Judge Blatchford held that this view of the twenty-first section was erroneous, and that the effect of that section was, that proceedings in a suit against the bankrupt to recover a provable debt must be stayed, whether that debt would be discharged or not by the discharge in bankruptcy. R. D. B.

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braced in the judgment set forth in the execution was created by the fraud or embezzlement of Seymour or by his defalcation while acting in a fiduciary character.

In connection with the petition for this writ of *habeas corpus*, and the writ itself, and the return thereto, Seymour presented to this court a petition, praying for his discharge from imprisonment and arrest during the pendency of proceedings in bankruptcy which he had instituted, and that all proceedings in the State court be stayed until the termination of said proceedings in bankruptcy. This petition showed that the suit in the Superior Court was commenced August 22d, 1866; that Seymour was held to bail, under an order of arrest in the suit, in the sum of five thousand dollars; that, on the 24th of June, 1867, he filed his voluntary petition in bankruptcy, in the District Court of the United States for the Eastern District of Louisiana, praying for his discharge under the Bankruptcy Act of March 2d, 1867; that, on the 20th of July, 1867, he was duly adjudicated a bankrupt by the court in Louisiana; and that the indebtedness to Rosswog was included in the schedule to the petition in bankruptcy, and was provable under the Act. Annexed to the petition was a copy of the judgment roll in the suit in the Superior Court. By this it appeared, that the cause of action in the suit was, that, in 1860, Rosswog, a manufacturing jeweler in New York, deposited with Seymour, then a wholesale jeweler in New Orleans, certain manufactured jewelry worth three thousand nine hundred and seventy-one dollars and seventy-five cents, which was deposited with Seymour for sale on commission, the proceeds to be remitted to Rosswog as soon as the goods should be sold, less five per cent. for cash, and, if the same should be sold on a credit, then Seymour should remit to Rosswog good business notes for the same, endorsed by Seymour; that Seymour received the goods for sale on those conditions, but had never rendered any account of them or paid for them;

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that Rosswog had demanded the goods from Seymour, and Seymour had refused to deliver them; that Seymour had sold many of the goods and received the price thereof, but failed and refused to pay over the same to Rosswog; and that Seymour had converted the goods, or the proceeds thereof, to his own use. The complaint claimed damages in twelve thousand dollars. The answer of Seymour denied all the material allegations of the complaint, and denied his indebtedness in any sum whatever. The case was tried before a jury May 10th, 1867, and a verdict was rendered for the plaintiff for five thousand two hundred and forty-two dollars and ninety cents, upon which judgment was perfected in the sum of five thousand five hundred and ninety-two dollars and seventy-four cents, May 18th, 1867.

The answer of Rosswog to the petition of Seymour showed that Rosswog had not proved his claim against Seymour in the bankruptcy proceedings, and claimed that the debt was created by Seymour while Seymour was acting in a fiduciary character toward Rosswog, and that no proceedings in bankruptcy affected the debt or the remedies of Rosswog therefor.

It was claimed, on the part of Seymour, that the debt in question was not within the enumeration of debts in the thirty-third section of the Bankruptcy Act, which can not be discharged under the Act.

For Seymour, *Thomas Dunphy*.

For Rosswog and the Sheriff, *R. B. Roosevelt, G. F. Noyes and J. F. Daly*.

BLATCHFORD, J. The twenty-sixth section of the Bankruptcy Act provides as follows: "No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debtor claim from which his discharge in bank-

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ruptcy would not release him." The purport of this provision of the twenty-sixth section is, that no person shall be held under arrest, or suffer imprisonment, in any civil action, during the pendency of proceedings in bankruptcy by or against him, whether he is first put under arrest after the commencement of the proceedings, or is imprisoned at the time the proceedings are commenced, unless the action is founded on some debt or claim from which his discharge in bankruptcy would not release him; but that he may, notwithstanding the pendency of proceedings in bankruptcy by or against him, be held under arrest, and suffer imprisonment, in a civil action, if such action is founded on a debt or claim from which his discharge in bankruptcy would not release him.

The question, therefore, arises, whether the debt due to Rosswog is one from which Seymour's discharge in bankruptcy would release him. In other words, is such debt, within the language of the thirty-third section of the Act, a debt created by the fraud of Seymour, or by his defalcation while acting in a fiduciary character? According to well settled authority, such a debt was created by the defalcation of Seymour while acting in a fiduciary character. The depositing of the property with Seymour for sale on commission for Rosswog, established a fiduciary relation between them, and charged Seymour with the execution of a trust on behalf of Rosswog, under which it was his duty either to return the property to Rosswog or to remit to him its proceeds. His failure to do so was a defalcation by him while acting in such fiduciary capacity, and such defalcation created the debt to Rosswog. Such debt will, therefore, not be discharged by the discharge of Seymour in bankruptcy, and consequently such debt is one for which, in a civil action founded on it, Seymour may be arrested and held under imprisonment during the pendency of proceedings in bankruptcy.

The case of *Chapman v. Forsyth*, (2 How., 202), only decides that a balance due from a factor to his principal, for

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goods of the principal's sold by the factor, is not a fiduciary debt within the meaning of the Bankruptcy Act of 1841. The Act of 1841 excluded from its benefits "all persons owing debts created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any *other* fiduciary capacity." The Supreme Court held, in *Chapman v. Forsyth*, that a discharge under the Act of 1841 did not release the bankrupt from any such debts, and that no debt fell within the description of a debt created by a defalcation "while acting in any *other* fiduciary capacity," unless it was a debt created by a defalcation while acting in a capacity of the same class and character as the capacity of executor, administrator, guardian and trustee. The court held, that the language of the Act of 1841 was not broad enough to include every fiduciary capacity, but was limited to fiduciary capacities of a specified standard or character. That was clearly so, under that Act. But, in the Act of 1867, the language seems to have been intentionally made so broad as to extend to a debt created by a defalcation of the bankrupt while acting in *any* fiduciary capacity, and not to be limited to any special fiduciary capacity. Therefore, under the Act of 1867, no debt created by the defalcation of a bankrupt while acting in any fiduciary capacity will be discharged, and a bankrupt can be imprisoned, during the pendency of proceedings in bankruptcy by or against him, in a civil action founded on any such debt.

The twenty-first section of the Bankruptcy Act does not apply to the present case. As Rosswog has not proved his debt in the bankruptcy proceedings by Seymour, he is not within the inhibitions imposed by that section on a creditor who proves his debt or claim. There is another provision of the twenty-first section, which is as follows: "No creditor whose debt is provable under this Act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against

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the bankrupt, until the question of the debtor's discharge shall have been determined, and any such suit or proceeding shall, upon the application of the bankrupt, be stayed, to await the determination of the court in bankruptcy on the question of the discharge; provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid." This provision cannot be regarded as applying to any suit or proceedings brought to collect or enforce or satisfy any debt which would not be discharged by a discharge granted under the Act. There can be no reason for staying any suit or proceedings to collect or enforce or satisfy a debt, until the question of the debtor's discharge shall have been determined by the court, if the discharge, when granted, will not discharge the debt. The statute ought not to be interpreted as extending to the staying of any suit or proceedings to collect or enforce or satisfy a debt which cannot be discharged, if any other interpretation is consistent with the language. If the reason for the stay ceases, the presumption is that the legislature did not intend that there should be a stay. No greater scope can be given to the suits and proceedings and debts named in the provision, than is given to the discharge by the Act, and, as the Act does not extend the effect of a discharge to the releasing of a debt created by the defalcation of the bankrupt while acting in a fiduciary character, this provision of the twenty-first section cannot be regarded as referring to the staying of any suit or proceedings to collect or enforce or satisfy such a debt.

It was urged, that the twenty-seventh rule of the "General Orders in Bankruptcy" provided for the release of Seymour, although the Act might not in terms apply



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to the case. That rule provides as follows: "If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the District Court, upon his application, may issue a writ of *habeas corpus* to bring him before the court, to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and, if so provable, he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be." Without deciding whether this rule can, in any case, be construed as extending the exemption from imprisonment further than it is extended by the Act itself, it is sufficient to say that the rule applies only to the court in which the proceedings in bankruptcy are pending. In the present case, the proceedings in bankruptcy are not pending in this court, and, therefore, the rule does not apply to this court.

If Seymour were restrained of his liberty under the process of a State court in violation of any law of the United States, this court would, under the provisions of the Act of February 5th, 1867, (14 *U. S. Stat. at Large*, 385,) have power to release him on *habeas corpus*. That Act extends the power of this court to such a case.

The result is, that Seymour must be remanded to the custody of the sheriff, and the prayer of his petition must be denied.

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In Matter of H. F. Metzler and T. G. Cowperthwaite, Involuntary Bankrupts.

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AUGUST, 1867.

IN THE MATTER OF HENRY F. METZLER AND  
THOMAS G. COWPERTHWAIT, INVOLUN-  
TARY BANKRUPTS.

INVOLUNTARY BANKRUPTCY.—INJUNCTION.—PERISHABLE PROPERTY.

Where petitions were filed in involuntary bankruptcy, and injunctions were issued to prevent the sale of the debtors' property on execution, the facts on which the injunctions were issued being the very acts of bankruptcy alleged, and the bankrupts had taken issue and demanded a jury, and motions were made to set aside the injunctions on the merits :

*Held*, That the court would not, on a motion, on affidavit, dispose of the issues which were involved in the proceedings.

That, if the property was perishable, that was no ground for dissolving the injunctions.

That the court had no power to sell the property, as perishable, at this stage of the proceedings, unless it was in the possession of the messenger.

This was a motion to dissolve injunctions. On July 18th, 1867, a petition was filed by Willson, Watrous & Co., as creditors of Metzler & Cowperthwaite, to have them adjudged bankrupts, and on July 22d an injunction was issued against the debtors and one Hervey C. Calkin, and the sheriff of New York, enjoining them from selling any goods of the debtors not excepted by the Bankruptcy Act. On July 23d a similar petition was filed by C. Cowles & Co., and on July 24th a similar injunction was issued against the same parties, and also against George E. Cowperthwaite and John N. Blasi. The act of bankruptcy alleged in the first petition was an assignment of property made by the debtors to Calkin on June 26th, 1867, in trust to pay certain preferred creditors. The assignment was shown to be in writing, and Calkin was alleged to have accepted it and taken possession of the property. The injunction, in the first

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In Matter of H. F. Metzler and T. G. Cowperthwaite, Involuntary Bankrupts.

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case, was issued on a petition of the creditors, which alleged the entry of a judgment on July 16th, in the Supreme Court of the State of New York, in favor of Calkin against the debtors, for \$3,531.60, and that it was entered in pursuance of an offer by the debtors to allow it, and that execution was on the same day issued to the sheriff of New York, who levied on the property included in the assignment, and had advertised it for sale under the execution.

The act of bankruptcy alleged in the second petition was the same assignment to Calkin, and that the debtors had suffered their property to be taken under the judgment in his favor, and under a judgment in favor of George E. Cowperthwaite, entered on an offer of judgment, for \$2,519.94, and under a judgment in favor of John N. Blasi, entered on a like offer, for \$1,885.30.

On the return of the orders to show cause, the debtors appeared and denied that they had committed the acts of bankruptcy alleged, and demanded a jury, which was ordered.

The motion to set aside the injunctions was made in behalf of Calkin and George E. Cowperthwaite, and was founded on affidavits, which set forth a written agreement made between them and the debtors, in March, 1866, by which they agreed to advance notes to the debtors, to secure which the debtors transferred to them the property which they then had or might afterwards have in their business, with a covenant to return the notes if demanded, and, in case they failed to return them, they agreed to execute such bill of sale, or confession of judgment, or other security, as should be demanded. The affidavits further showed the advance of the notes to the debtors, and a further advance of \$1,000 by Calkin, and a demand by him of repayment of this \$1,000, and that the debtors were unable to repay it, but offered to make an assignment and prefer Calkin and George E. Cowperthwaite. They further set up the assignment to Cal-

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kin, and that George E. Cowperthwaite was absent when it was made; that, when he returned, he refused to assent to it; that, thereupon, on July 10th, Calkin and George E. Cowperthwaite served written notice on the debtors, demanding a return of the securities, as provided in the agreement of March, 1866; that the debtors refused to return them; and that, thereupon, the suits were commenced in favor of Calkin and George E. Cowperthwaite, and the judgments entered and executions issued.

The affidavits in opposition showed that the debts of the creditors were for materials furnished the debtors since January 1st, 1867, to be used in their business, and that the creditors had no knowledge of the agreement of March, 1866, till after the judgments were entered.

For the motion, *N. Cross.*

In opposition, *H. Sheldon and W. E. Curtis.*

BLATCHFORD, J. It is urged, as a ground for dissolving the injunctions, that the assignment to Calkin, and the obtaining of the judgments against the firm, were valid transactions, and not void under the Bankruptcy Act, and that they were merely in fulfilment of a previous agreement, and were the effect of measures taken by the creditors. These transactions are the very acts of bankruptcy alleged in the original petitions of the creditors, and the very acts, the commission of which is denied by the debtors, and in respect to which they have demanded, and the court has ordered, trials by jury. The injunctions were granted under the fortieth section of the Act. The intent of the provisions of that section manifestly is, to give the court authority, in a case of involuntary bankruptcy, when an order is issued requiring the debtor to show cause why he should not be declared a bankrupt, to prevent, by injunction, any interference with the

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In Matter of H. F. Metzler and T. G. Cowperthwaite, Involuntary Bankrupts.

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debtor's property, until a decision shall be arrived at, whether the debtor is or is not to be adjudged a bankrupt. In the present case, no such decision has been arrived at. The decision is suspended by the act of the debtors, in denying that they have committed the act of bankruptcy alleged, and in demanding a trial by jury. The same facts which constituted sufficient ground for issuing the order to show cause, also furnish sufficient reasons for issuing the injunction. The court will not, on a motion of this kind, on affidavits, dispose of what are really all the issues involved in the proceeding. If the injunctions should be dissolved, and the debtors should afterwards be adjudged bankrupts, and an assignee of their estate be appointed, the court would have dissolved the injunctions on the same state of facts on which the debtors were adjudged bankrupts. Substantially, the whole of the property of the debtors would have passed to the three preferred creditors, leaving to the assignee only an inheritance of litigation, and the very object of the remedy by injunction, given by the fortieth section, would have been defeated. Without deciding, therefore, definitely, whether the transactions set forth are or are not void, under the Bankruptcy Act, it is sufficient to say, that there is probable cause for continuing the injunctions, until it shall be decided whether the debtors are or are not to be adjudged bankrupts. Indeed, independently of anything contained in the agreement of March, 1866, the including in the judgment, in favor of Calkin, of the \$1,000, not provided for by that agreement, would be a good ground for continuing the injunction, as respects that judgment; and the giving of the judgment to Blasi would be a sufficient ground for granting an injunction, as respects any property levied upon under an execution on that judgment.

It is represented that the property levied on under the executions on the judgments and about to be sold, is perishable, and that it is for the interest of all parties

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In Matter of H. F. Metzler and T. G. Cowperthwaite, Involuntary Bankrupts.

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that it should be sold and preserved for whoever may be entitled to the proceeds. But it is not proper to dissolve these injunctions, and thus allow the proceeds of the property to pass to the judgment creditors, to the exclusion of an assignee in bankruptcy, who may in the end be entitled to claim it. This court has no power to order the sale of the property as perishable, at the present stage of the proceedings, unless it is in the possession of the messenger, (*Rule 22 of the General Orders in Bankruptcy*), and it cannot come into the possession of the messenger until a warrant is issued under section forty-two, unless a warrant be issued, under section forty, to the marshal, to take possession of it provisionally. Such warrant cannot issue unless it appears that there is probable cause for believing that the debtor is about to remove or conceal his goods and chattels, or his evidence of property, or make a fraudulent conveyance or disposition thereof. But the fact that this court has no power to order the sale of this property at the present time, is no reason why it should not exercise the power, which is expressly given to it, of interposing, by injunction, to prevent any interference with the property until it shall be decided whether the debtors are or are not to be adjudged bankrupts.

The motion to dissolve the injunctions is denied.

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In the Matter of Freeman Orne, a Bankrupt.

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SEPTEMBER, 1867.

IN THE MATTER OF FREEMAN ORNE,  
A BANKRUPT.

## AMOUNT OF DEBT.—INTEREST.—COUNTER CLAIM.

Where, at an adjourned meeting of creditors, the bankrupt objected to the proof of debt of a creditor, and requested the register to allow the creditor to vote for assignee, only in respect of a portion of his claim, because (1) Interest was included to make up the amount, and (2) Part of the claim was on a draft given on a purchase of lumber by the bankrupt, which was never delivered by the creditor, so that the consideration of the draft entirely failed, and the bankrupt was also entitled to damages, which should be set off against the rest of the creditor's claim, and his debt should only be allowed for the remainder; and where the bankrupt offered himself as a witness to prove his allegations, but the register refused to hear his evidence or to reduce the amount of the claim, and certified the question to the court:

*Held*, That, under the provisions of the nineteenth section of the Bankruptcy Act, if a debt is due from the bankrupt, so as to bear interest, before the adjudication in bankruptcy, the amount of the debt to be proved is to be ascertained, by adding the interest until the day of the adjudication; and that, if the debt becomes due and payable, without interest, after the adjudication, its amount is to be ascertained by taking off interest from the day of adjudication until the day it will become payable.

That the register erred in refusing to receive evidence that the consideration for the draft had entirely failed.

That, as the claim on the draft was contested, the register ought, before going further, to investigate the question raised as to the consideration, with a view of postponing the proof of the claim if necessary, as required by the twenty-second section.

That the claim for damages on the contract for the purchase of lumber, ought to have been stated in the bankrupt's schedule of property.

That that claim, being unliquidated, cannot be applied as a set off against any part of the creditor's claim, and must be wholly disregarded in the proceedings for the choice of an assignee. Whether, if put into the shape of a debt against the creditor, it would fall within the purview of § 20 of the Act, *quere*.

In this case, at an adjourned meeting of the creditors of the bankrupt, held August 27th, 1867, for the proof of

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debts and the choice of an assignee, objections were raised by the bankrupt to a proof of debt by Benjamin Pope & Co. The proof was filed with the register, August 7th, 1867, the amount of the claim being \$11,512.34, and the consideration an account current for goods, a check, and a draft, and interest on the three items. The bankrupt requested the register to strike out of the amount of the claim all but \$2,000, which is the amount of the debt set out in the schedules filed with the bankrupt's petition, as due to Benjamin Pope & Co., and to admit that firm to the right to vote for an assignee only to the amount of \$2,000. The grounds assigned for this request, were as follows: (1.) That, upon the face of the claim, as stated, there was included interest upon the claim to the amount of \$1,798.18, which interest was added to the debt to make up the amount proved, and that interest on a matured debt cannot be included in the amount proved against a bankrupt's estate; (2.) That the draft, for the amount of \$6,706.29, which formed a part of the claim, was given for the purchase of lumber contracted to be delivered by the creditors to the bankrupt; that the lumber was not delivered in pursuance of the contract, nor accepted by the bankrupt, that thus the consideration of the draft had entirely failed; and that, by reason of the failure of the creditors to fulfil the contract, the bankrupt was entitled to damages, which, set off against that portion of the claim which was in open account, would reduce the indebtedness of the bankrupt to Pope & Co. to \$2,000. The bankrupt offered to show these facts by his own examination, under oath, and claimed that the creditors should be allowed to prove their claim only to the amount of \$2,000, or that the register should, under section twenty-three of the Bankruptcy Act, postpone proof of the claim until the assignee should be chosen. The register refused to strike out the claim and reduce it as requested, or to admit Pope & Co. to vote for an assignee only to the amount of \$2,000 of



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In the Matter of Freeman Orne, a Bankrupt.

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the claim proved. Thereupon, the register, at the request of the bankrupt, adjourned the question into court for decision, and certified the foregoing statement. The register stated, in his certificate, that, in his opinion, the proof of debt was sufficient to place Pope & Co. on the list of voters for assignee, to the full amount claimed, and that the question as to whether the firm was entitled to interest on the full amount of the claims could properly come up on a future occasion and in another manner. The register also reported, that the claim of Pope & Co. was not stated in schedule A to the debtor's petition, at its full amount, with a statement in schedule B, of the amount of the set-off claimed, as directed by the notes of instruction on form 3 in schedule A, established by the Supreme Court, but was set out as \$2,000 "for merchandise."

BLATCHFORD, J. In regard to the interest on the items of the claim, included in the amount proved, I do not understand that the bankrupt claims that the items do not properly carry interest, or that interest would not be recoverable on the principal sums of the items, if the claims were to be put in suit against the bankrupt. The claim merely is, that interest on a matured debt cannot be included in the amount proved against the bankrupt's estate. The nineteenth section of the Bankruptcy Act provides, "that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt." Under this provision, when a debt is in existence at the time of the adjudication of bankruptcy, but is not payable until afterwards, and the debt is one not bearing interest or not running with interest, that is, is one on which, when it becomes payable, there will be payable merely the amount of the debt,

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without an additional sum for interest, in such case, the debt may be proved for the amount of its worth or value at the time of the adjudication of bankruptcy, which worth or value is to be arrived at, by deducting from the amount of the debt the amount of the interest on it, from the time of the adjudication of the bankruptcy until the time it becomes payable. The time of the adjudication of bankruptcy is taken, by the statute, as the decisive time. The debt must exist at that time or it cannot be proved. If it is created afterwards it cannot be proved. If it exists then, but is not payable till afterwards, and is not a debt running with interest, that is, if, for instance, it is a promissory note for so many dollars, given before the adjudication of bankruptcy, but not maturing till afterwards, then a rebate must be made from its amount, of the interest on that amount, from the time of the adjudication of bankruptcy to the time of the maturity of the note. It is equally clear that, where the debt is one, not only in existence at the time of the adjudication of bankruptcy, but payable before that time, and running with interest, by its terms or character, so that the obligation of the debtor in regard to the debt will not be wholly discharged without payment of such interest as well as the principal, the statute intends that the debt shall be proved for the amount of the principal and of the interest thereon to the time of the adjudication of bankruptcy. In the present case, as the items composing the claim were all of them due and payable by the bankrupt at the time of the adjudication of bankruptcy, and, as interest was running on all of them at that time, it was proper for the creditors to include, in the amount proved, interest to that time. Interest was included to August 7th, 1867. Whether that was the time of the adjudication of bankruptcy is not stated in the certificate. If, inadvertently, the interest has been computed for a wrong period, the register has, in the proof of debt, the means of correcting the error, and should allow the interest for the proper

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In the Matter of Freeman Orne, a Bankrupt.

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period. By taking the time of the adjudication of bankruptcy as the time for stating the then present worth or value of the various debts proved, equal and exact justice is done to all creditors whose debts exist at that time, although they may have been or may be payable at various times, and may carry different rates of interest.

The objection taken by the bankrupt in regard to the draft for \$6,706.29, consists of two branches. (1.) A claim that the consideration of the draft has entirely failed, and, consequently, that nothing is due on the draft; (2.) A claim that Pope & Co. are indebted to the bankrupt in an unliquidated sum of money, for damages for breach of contract, and that such sum must be set off against that portion of the claim of Pope & Co. which is in open account.

As regards the first branch, the twenty-third section provides that, "when a claim is presented for proof before the election of the assignee, and the judge entertains doubts of its validity or of the rights of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen." The sixth rule of this court provides that, "if the register entertains doubts of the validity of any claim, or of the right of a creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone proof of the claim until the assignee is chosen." The twenty-second section of the Act provides, that "the court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering, or who has made, proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake." Under the fourth sec-

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tion of the Act, and the fifth rule of the "General Orders in Bankruptcy," the register has power to take this evidence, in regard to a debt or claim proved or sought to be proved. Now, in this case, it appears that the bankrupt offered himself for examination, to show that the consideration of the draft had entirely failed; and I understand, from the certificate, that the register refused to receive evidence on the question of the failure of the consideration of the draft. In this the register erred. The purport of the twenty-third section is, that it is the duty of the register, when he entertains doubts of the validity of a claim or of the right of a creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, to postpone the proof of the claim until the assignee is chosen. When a question is raised as to the validity of a claim, and evidence is offered in regard to it, it is impossible for the register to come to a proper conclusion as to whether proof of the claim should be postponed, without hearing the evidence offered, and then, if necessary, going on to exercise the power of investigation conferred by the twenty-second section. The register ought, therefore, before proceeding further in the case, to investigate the question raised as to the consideration of the draft, and not allow the draft as a debt, merely because the creditor has sworn to it, if evidence is offered to impugn it.

In regard to the claim for damages set up and claimed as a set-off against the open account, it ought, according to form three, in schedule A to the petition, to have been stated in the bankrupt's schedule of property. The claim is an asset of the bankrupt, of which the assignee, when appointed, will take cognizance, and it is not a claim which can, at this stage of the proceedings, be used by way of set off against any part of the claims of Pope & Co. It is a wholly unliquidated claim, and its amount cannot now be arrived at. When it is put into the shape of a debt against Pope & Co., it may, perhaps,

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About 25,000 Gallons of Distilled Spirits, &c.

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then fall within the purview of section twenty of the Act, which provides, "that, in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid." It is a claim which must be wholly disregarded in the proceedings for the choice of an assignee.

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AUGUST, 1867.

### ABOUT 25,000 GALLONS OF DISTILLED SPIRITS, &c.

#### INFORMER'S RIGHT UNDER REVENUE LAWS.—WHEN IT VESTS AND BY WHAT LAW IT IS DETERMINED.—OPENING A DECREE.

Where a proceeding was commenced to forfeit property under the Internal Revenue laws, and the claimant consented to its condemnation, the value of certain portions being paid into court and those portions released, and a decree of forfeiture against the whole was entered, and that decree was set aside by the court, on application of the claimant, and he came in to defend, but, at a subsequent date, a decree of forfeiture was again entered, under which the property in custody was sold, and its proceeds, together with the amount previously paid in, were held for distribution, and the informer claimed to be entitled to share according to the provisions of the law existing at the time he gave the information:

*Held*, That, under the Revenue laws, the right of the informer becomes vested only when the money representing the forfeited property is paid over and is ready for distribution.

That until then his right is liable to be divested by the act of the Government.

That § 9 of the Act of July 13th, 1866, as to the time when the informer's right becomes vested, is merely declaratory of the law.

That the court had the right to set aside the first decree, without the informer's consent.

That the money paid into court was never ready for distribution until the second decree of forfeiture.

That the amount of the informer's share must be determined by the law as it stood at the time of the final decree of forfeiture, and not as it stood at the time of the first decree.

This suit was commenced March 3d, 1866, by information praying the forfeiture of certain property for a violation of the Internal Revenue laws. On the same day, James A. Dorman put in a claim to the property, and consented in open court to the condemnation of the distilled spirits proceeded against, and to the appointment of appraisers of the other property libelled, with a view to the payment into court of its appraised value in lieu of its sale on condemnation, its forfeiture being also consented to, and an order to that effect was entered. The report of the appraisers, filed on the 6th of March, 1866, appraised the value of all the property, except the distilled spirits, at \$18,000. Among this property was 5,000 bushels of horse feed, appraised at \$3,000. On the 10th of March, 1866, the claimant paid into the registry of the court \$15,000, as the appraised value of all the property except the horse feed and the distilled spirits, and afterwards, on the same day, a decree was entered, by consent of the claimant, releasing and discharging from custody the horse feed, and discontinuing this action as to the same, and condemning the spirits and the rest of the property (except the horse feed), and the proceeds so paid into court, and ordering the sale of the spirits, and directing the clerk to retain the proceeds of such sale and the \$15,000, to await the further order of the court. On the same day, an order was entered discharging from custody, and delivering to the claimant, all the property proceeded against except the spirits. On the 26th of April, 1866, this court, upon affidavits and the motion of the claimant, the United States not resisting the motion, made an order that the proceedings as to the horse feed stand, and that the decree of March 10th, 1866, as to the condemnation and forfeiture of the spirits, be vacated, and the writ of sale as to the same be set aside (the same not having been yet sold), and that the spirits remain subject to the further order of the court, and that the proceedings under which the sum of \$15,000, as the ap-

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About 25,000 Gallons of Distilled Spirits, &c.

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praised value of the rest of the property, was paid into the registry of the court stand, the proceeds to remain in court to abide its further order, and that the condemnation and forfeiture of the property represented by the \$15,000 be vacated, and that the claimant have leave to defend and answer, and that the cause stand for trial at the May Term, 1866. On the 2d of May, 1866, Dorman filed his answer, denying all the allegations of the information. On the 17th of December, 1866, a decree was entered, by consent of the claimant, that the spirits, and the \$15,000 so in the registry of the court, be condemned as forfeited to the United States, and that a writ of sale be issued, and that the marshal pay the proceeds into the registry of the court, to abide the further order and decree of the court thereon. A writ for the sale of the spirits was issued, and, on the 16th of January, 1867, the marshal returned the writ, and paid into the registry of the court \$43,832 31, as the proceeds of the sale, after deducting the marshal's costs and disbursements, which amounted to \$3,233 64, the gross proceeds of the sale having been \$47,065 95. The commissions of the district attorney were taxed at two per cent. on \$62,065 95, that is, two per cent. on the gross proceeds including the \$15,000, and amounted to \$1,241 32. The costs of the clerk of the court were \$644 52. This left in the registry of the court \$56,946 47, as net proceeds. On the 11th of March, 1867, the court made an order, referring it to Commissioner Betts to ascertain and report who was the informer herein, and on whose information the condemnation herein took place, and when such information was given, and what decrees of forfeiture had been entered herein, and when such decrees were entered, and how much had been realized under said decrees, and what number of gallons of spirits were made or run off after the seizure, and what the amount of tax on such spirits was, and to what share of the proceeds the informer was entitled, under any and all Acts of Congress,

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About 25,000 Gallons of Distilled Spirits, &c.

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all questions of law as to what Acts of Congress said informer was entitled to claim under, and all other questions of law, to be reserved until the coming in of the report, and such questions of law to be passed upon by the court. On the 5th of June, 1867, the commissioner filed his report. He reported that Benjamin A. McDonald was the informer herein, and the person on whose information the condemnation herein took place, and that such information was given on the 15th of February, 1866. He also reported the facts as to the entry of the decree of March 10th, 1866, and of the order of April 26th, 1866, and of the decree of December 17th, 1866, as they are above set forth. He also reported that McDonald did not consent to the order of April 26th, 1866; that the cause was postponed, at the May Term, 1866, on the application of the United States, on account of the absence of a witness; that the basis of the decree of December 17th, 1866, was a default duly taken in favor of the United States, at the December Term, 1866; that, of the amount realized under the decree, there remained in the registry of the court the sum of \$56,946 50; that, after the seizure of the distillery and property, 12,000 bushels of the grain seized were run off, at the request of the claimant, and 4,200 gallons of spirits were the result, and that was added to the other spirits, and what remained of the same was sold with the rest of said spirits; that the amount of tax on said 4,200 gallons was \$2 per gallon, making in all \$8,400; that the informer was entitled, under the different Acts of Congress, to the following shares, accordingly as the court should determine under which of said Acts the informer was entitled to share, namely: (1.) If the informer's share were to be paid, as to the entire proceeds, under the Act of July 13th, 1866, his share would be \$5,000. (2.) If the informer's share were to be paid, as to the \$15,000 paid into the registry of the court, March 10th, 1866, according to the Act then in force, and, as to the residue of the proceeds, according



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to the Act of July 13th, 1866, his share would be one-half of the \$15,000, or \$7,500, and \$5,000 of the residue, making a total of \$12,500. (3.) If the informer were to be paid, as to the entire proceeds, under the Act in force at the time of the seizure, then the informer's one-half of the entire proceeds would be \$25,473 25. The United States excepted to the report in these particulars: (1.) To so much as stated that McDonald did not consent to the order of April 26th, 1866. (2.) To all that portion of the report which referred to the amount to which the informer was entitled, which was included under the third head in the report on that subject. The case came up for hearing on the report and the exceptions, and on the questions of law reserved in the order of March 11th, 1867.

For the United States, *S. G. Courtney, U. S. District Attorney.*

For McDonald, *C. Donohue.*

BLATCHFORD, J. The first exception is allowed, and the second exception is disallowed.

The main question arising on the facts in this case is as to the share of the proceeds to which McDonald is entitled. This depends on the question as to when his right to a share in such proceeds became vested in him. If such right became vested when the information was given by the informer which led to the seizure, the amount of his share must be determined by the law then in force. If such right became vested only by judgment and payment of the forfeiture thereunder, then the amount of his share must be determined by the law in force at the time of such payment. By section 41 of the Internal Revenue Act of June 30th, 1864, and section 179 of the same Act, as amended by section 1 of the Act of March 3d, 1865, which was the law in force at the time the information was given by the informer, the informer

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About 25,000 Gallons of Distilled Spirita, &c.

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was entitled to a moiety of the forfeiture, on distribution. By section 9 of the Act of July 13th, 1866, which took effect August 1st, 1866, the law was amended, so as to give to the informer such share as the Secretary of the Treasury should, by general regulations, provide, not exceeding one moiety, nor more than \$5,000 in any one case. Under this amendment and the regulations made thereunder, the share of the informer in this case would be \$5,000. Section 9 of the Act of July 13th, 1866, also provides as follows: "It is hereby declared to be the true intent and meaning of the present and all previous provisions of Internal Revenue laws, granting shares to informers, that no right accrues to or is vested in any informer, in any case, until the fine, penalty, or forfeiture in such case is fixed by judgment or compromise, and the amount or proceeds shall have been paid, when the informer shall become entitled to his legal share of the sum adjudged or agreed upon and received."

The informer claims that his share of the proceeds in this case is to be determined by the law which was in force when he gave the information which led to the seizure; that, under that law, he is entitled to one-half of the proceeds of the forfeiture; that his right vested at the time he gave the information, subject to the result of a suit; that the decree relates back to the time of the seizure; and that, after the decree of forfeiture in March, 1866, no subsequent consent of the United States opening the decree could change the vested rights of the informer.

It has been uniformly held, under all Revenue laws, that the title of the seizer or informer is liable to be divested by the Government, until the money is actually paid over for distribution. (*Opinion of Attorney-General Berrien, Opinions of Attorneys-General, vol. 2, p. 331; United States v. Morris, 10 Wheaton, 290; Norris v. Crocker, 13 Howard, 440.*) When the money representing the forfeited property is actually paid over and is

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About 25,000 Gallons of Distilled Spirits, &c.

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ready for distribution, then, and then only, does the interest of the informer become vested in the money. In this particular, the special provision, before cited, in section nine of the Act of July 13th, 1866, as to the time when a right accrues to or is vested in an informer, is merely declaratory of what the general law was before that provision was enacted. Until the money is paid over for distribution, the United States have complete control over the suit brought to enforce the forfeiture, and over the forfeiture itself. They can remit the forfeiture and control the suit, at their pleasure. The suit is, by law, brought in the name of the United States, and there is nothing in the statutes applicable to this case, through which alone the informer acquires a right to any share at any time, to indicate that Congress did not intend that the United States, as *magister litis*, should exercise complete control over the suit and its management, until the proceeds of the forfeiture should be ready for distribution.

In the present case, although the \$15,000 were paid into court before the entering of the decree of March 10th, 1866, yet it was paid in merely as representing the property of which it was the appraised value; and then the decree of March 10th, 1866 was entered, condemning the spirits and the \$15,000 as forfeited to the United States, and ordering a writ of sale, and further ordering that, on the return of the writ, the clerk retain the proceeds, together with the \$15,000, to await the further order of the court. The writ of sale was issued, but, before it was executed as to the spirits, it was set aside, by the order of April 26th, 1866. The \$15,000, although in court, cannot be regarded as having been ready for distribution, any more than if it had been in the shape of the property which it represented, or as having been beyond the control of the court, so far as respected any vested right of the informer in it. Then came the order of April 26th, 1866, setting aside the first decree and

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One Still, Boiler, &c., Found at 56th Street, near 7th Avenue.

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opening the whole matter. This decree the court had a right to make, without the consent of the informer. The result is, that the case stands wholly on the decree of December 17th, 1866, and the informer is entitled only to such share as is given to him by the Act of July 13th, 1866, and the Treasury regulations made thereunder, as respects the \$15,000, as well as the proceeds of the spirits, and that he is entitled to only the sum of \$5,000.\*

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AUGUST, 1867.

ONE STILL, BOILER, &C., FOUND AT 56TH  
STREET, NEAR 7TH AVENUE.

INFORMER'S SHARE.—PERCENTAGE ON GROSS AMOUNT.

Under § 179 of the Internal Revenue Act of June 30th, 1864, as amended by the Act of July 13th, 1866, and the regulations of the Secretary of the Treasury of August 4th, 1866, the amount of an informer's percentage is to be calculated upon the gross proceeds of the forfeiture, without deducting the costs.

BLATCHFORD, J. In this case, William H. Craig was the person who first informed of the cause, matter, and thing whereby the forfeiture of the property proceeded against and condemned in this suit was incurred. The condemnation was by default. The informer now asks the court to decree, that he is entitled to have the share or percentage of such forfeiture, to which, as such person, he is entitled, computed on the whole or gross amount of the proceeds of the sale of the property.

By section one hundred and seventy-nine of the Internal Revenue Act of June 30th, 1864 (13 U. S.

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\* This decision was affirmed by the Circuit Court, on appeal.

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One Still, Boiler, &c., Found at 56th Street, near 7th Avenue.

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*Stat. at Large*, 305), as amended by the Act of July 13th, 1866 (14 *Id.*, 145), it is provided, that "all fines, penalties, and forfeitures which may be imposed or incurred, shall and may be sued for and recovered, where not otherwise provided, in the name of the United States; \* \* \* and, where not otherwise provided for, such share as the Secretary of the Treasury shall, by general regulations, provide, not exceeding one moiety, nor more than five thousand dollars in any one case, shall be to the use of the person, to be ascertained by the court which shall have imposed or decreed any such fine, penalty, or forfeiture, who shall first inform of the cause, matter, or thing whereby such fine, penalty, or forfeiture shall have been incurred." In pursuance of this provision, the Secretary of the Treasury issued Circular Instructions, dated August 14th, 1866, which are still in force, wherein, after reciting the language of the Act of July 13th, 1866, he says: "Under the authority here conferred, the following schedule of informers' shares is hereby prescribed: Of the first five hundred dollars of any penalty, the informer shall receive fifty per cent.; of the next fifteen hundred dollars, forty per cent.", &c., &c. The Secretary then says: "Thus, if the penalty is five hundred dollars, the informer will receive two hundred and fifty dollars; if one thousand dollars, four hundred and fifty dollars; if two thousand dollars, eight hundred and fifty dollars," &c., &c. These regulations are still in force, and it is not disputed that they are applicable to the present case. But it is contended, on the part of the Government, that it is the meaning of the statute, that the informer's share, whatever it may be, shall be estimated on the sum actually received *by the Government*; that, until recently, the marshal, on the sale of forfeited property, paid its proceeds into the registry of the court, and the clerk then paid, out of such proceeds, the costs and expenses of the suit, and paid over the remainder to the collector of Internal Revenue, for

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One Still, Boiler, &c., Found at 56th Street, near 7th Avenue.

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distribution ; that, in such case, the sum received *by the Government* was the sum received by the collector, and not the sum paid into the registry of the court, the clerk receiving the money from the marshal, not as the agent of the United States, but as the officer of the court ; that where, as now, the practice is for the clerk to pay the informer's share directly to him, and the balance directly to the proper Government officer, *the Government* does not, any more than in the other case, receive that portion of the proceeds which has been consumed in the payment of costs ; that this view is supported by the decision made by Judge Benedict, in the case, in the Eastern District of New York, of *The United States v. Seven large fermenting tubs*, who, while holding that, under the statute and the general regulations made by the Treasury Department, the percentage of the informer is to be calculated upon the gross proceeds of the forfeited property, also held, that the costs of the proceedings, through which the fund in court is realized, are a charge upon *the whole fund*, and must, in the distribution, be paid out of the proceeds of sale, before the share of the informer can be distributed to him ; that, in this view, *the Government* cannot be said, in any proper sense, to receive the costs, so as to distribute a portion of them to the informer ; and that the informer has nothing to do with anything but what *the Government* actually receives.

This whole argument on the part of the Government is based on a fallacy. The share given to the informer by the statute, is such share of the fine, penalty, or forfeiture, whether it is recovered with or without judgment or decree (but not exceeding one moiety, nor more than five thousand dollars in any one case), as the Secretary of the Treasury shall prescribe by general regulations. The statute confides the whole matter of *the amount* of the informer's share to the discretion of the Secretary, to be exercised by general regulations, subject to the limitation fixed by the statute. In the case of a fine, penalty,

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One Still, Boiler, &c., Found at 56th Street, near 7th Avenue.

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or forfeiture recovered by suit, the statute requires that the court decreeing the recovery shall ascertain who was the first informer ; and, in the case of any sum paid without suit, or before judgment, in lieu of fine, penalty, or forfeiture, the statute requires the Secretary to determine, under general regulations to be made by him, who was the first informer. The first informer is defined by the statute to be the person who first informed of the cause, matter, or thing, whereby the fine, penalty, or forfeiture was incurred. That person is the person declared by the statute to be entitled to the share so to be prescribed by the Secretary, by general regulations. The statute contemplates that the general regulations shall assign to an informer one and the same share of a fine, penalty, or forfeiture, whether it is recovered by suit, or whether a sum is paid in lieu of it, by way of compromise ; and the Secretary has so interpreted the law. The shares he prescribes are for shares of all proceeds and moneys, whether recovered by judgment or paid without suit or before judgment, and are applicable to all fines, all penalties, and all forfeitures incurred under the internal revenue laws. The fallacy of the view taken by the Government, is in the idea that, under the statute or the general regulations, the informer's share is to be estimated on the sum received *by the Government*. There is, in the first place, nothing in the statute to uphold this view. That portion of the section which speaks of the vesting of a right in the informer, has reference solely to the time when the right shall vest in the informer, and says that no right shall accrue to or be vested in the informer until the fine, penalty, or forfeiture is fixed by judgment or compromise, and the proceeds or amount shall have been paid, and that then the informer shall become entitled to his legal share of the sum adjudged, or agreed upon, and received. There is nothing in this provision which necessarily restricts the informer's share to a share of the proceeds or amount paid to or received

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One Still, Boiler, &c., Found at 58th Street, near 7th Avenue.

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*by the Government.* The provision has no reference to amount, but concerns only the question of time, and was intended to guard against all claim by an informer to a vested right in a fine, penalty, or forfeiture incurred. Nor, in any view, can the word *paid*, or the word *received*, in this provision, mean *paid to the Government*, or *received by the Government*. The provision, so far as the import of the words *paid* and *received* is concerned, means, that until, in the case of a recovery by judgment, the fine, penalty, or forfeiture is fixed by the judgment, and the amount or proceeds shall have been paid thereunder, and until, in the case of the payment of a sum without suit or before judgment, in lieu of fine, penalty, or forfeiture, the sum is fixed by compromise and paid, the informer shall have no right, or title or vested interest to or in any share of it. The words *paid* and *received* have no reference whatever to the payment to, or the receipt by, the Government of its share of the amount or proceeds of the recovery, or of its share of the sum paid by way of compromise. In the present case, under the decree of condemnation, the right of the informer did not vest until the payment to the marshal of the proceeds of the sale of the condemned property, but, when those proceeds were paid to the marshal, then the informer became entitled to his legal share of those proceeds. That share is a percentage, to be calculated, according to the general regulations, on the gross amount of the proceeds so paid to the marshal. Those gross proceeds are *the forfeiture*, or, in other words, the property condemned as forfeited, and ordered by the decree to be sold by the marshal; and the general regulations give to the informer, as his share, a percentage to be calculated on the amount of the forfeiture, that is, on the amount of the gross proceeds of the sale of the property condemned as forfeited. If any interpretation were to be given to the provision of the statute which says that the informer shall be entitled to his legal share of the sum



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One Still, Boiler, &c., Found at 56th Street, near 7th Avenue.

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adjudged, or agreed upon, and received, as in any way defining the amount of the share, such interpretation would be, that the informer is entitled to a share of the sum adjudged, or the proceeds of the property adjudged, to be the forfeiture, or the sum agreed upon in lieu of the forfeiture, *and* received, and thus to a share, in the present case, of the gross proceeds of the sale of the property condemned as forfeited. But the whole question of the amount of the share, within the limits fixed by the statute, is left to the Secretary. He may, by general regulations, make it greater or less. He might have followed the example set by the ninety-first section of the Tariff Act of March 2d, 1799, which says, that all fines, penalties, and forfeitures, recovered by virtue of that Act, shall, "after deducting all proper costs and charges," be disposed of in a certain way. He might have directed that the costs and expenses of the suit should be first deducted, and that the informer should then have a certain percentage of the net proceeds remaining. But he has not seen fit to do so. He has said, as strongly as negative language can say it, that the costs and expenses of the suit shall not be first deducted, but that the informer shall receive a percentage, to be calculated on the amount paid as a fine or penalty, by the person on whom the fine or penalty is imposed, or on the proceeds of the sale of the property condemned as forfeited, and that no part of the costs or expenses shall be charged upon the share of the informer. The Secretary had a right to say this. He had a right to give to the informer such share, within the limits fixed, as, in the exercise of his discretion, he thought calculated to promote the objects aimed at by the statute. The statute was intended to encourage persons to inform as to causes of forfeiture, and the presumption is, that the Secretary deemed it wise, on the whole, to hold out to informers the inducements offered by his regulations, by saying to them that no part of the costs or expenses

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One Still, Boiler, &c., Found at 56th Street, near 7th Avenue.

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should be charged upon the share resulting from the percentage affixed to a given case. And, in this connection, I am free to say, that I do not concur with Judge Benedict in his view, that the costs and expenses of the proceedings, through which the fund in court is realized, are a charge on *the whole fund*, and must be paid out of the proceeds of sale, before the share of the informer can be distributed to him, if the conclusion from that view is, that the informer's share, ascertained by computing his percentage on the gross proceeds, can be made liable for a portion of the costs and expenses, if the residue beyond the informer's share is not sufficient to defray those costs and expenses.

The result is, that an order must be entered, in this case, declaring William H. Craig to be the person who first informed of the cause, matter, or thing whereby the forfeiture of the property condemned in this suit was incurred, and that he is entitled to have the share or percentage of such forfeiture, to which, as such person, he is entitled, computed on the gross amount of the proceeds of the sale by the marshal, under the decree herein, of such property.

*S. G. Courtney*, (*District Attorney*), for the United States.

*Henry & Clarkson*, for the informer.

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In the Matter of John Pulver, a Bankrupt.

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SEPTEMBER, 1867.

**IN THE MATTER OF JOHN PULVER, A BANKRUPT.****BANKRUPTCY PRACTICE.—DUTY OF REGISTERS.—STATEMENT OF RESIDENCE OF CREDITORS.—NOTICE.—MARSHAL'S RETURN.**

Where the petition in bankruptcy stated the present residences of certain creditors to be unknown, but gave their former residences:

*Held*, That the statement as to the present residence was sufficient; that the statement of the previous residence was surplusage, and that the bankrupt should show, either in the schedules attached to his petition or in a separate affidavit, what efforts he had made to find the present residence.

That the marshal's return to the warrant, though not conclusive, is sufficient to authorize the register to proceed, if it shows due service and publication.

That the marshal should copy into the notices the exact language used in the warrant, but that immaterial variances are to be disregarded by the register.

Registers in bankruptcy should certify to the court only questions which actually arise.

In this case, the petitioner was adjudged a voluntary bankrupt, July 6th, 1867. On the same day a warrant was issued to the marshal. The return day of the warrant, that is, the day for the first meeting of creditors, was August 27th, 1867. The register sent to the court a certificate dated that day, stating that, in the course of the proceedings before him, thirteen questions arose, which were set forth in a statement annexed to the certificate, and that the questions were pertinent to the proceedings, and were stated on the part of the bankrupt. The register then went on to state his opinion upon each of the thirteen questions, and concluded by saying that the bankrupt requested that the same should be certified to the judge for his opinion thereon.

BLATCHFORD, J. It is manifest, from the face of the statement annexed to the certificate of the register, that

several of the questions stated are purely hypothetical, and did not arise in the course of the proceedings before the register. The meeting on the 27th of August was the first meeting of creditors. So far as appears, no creditor proved a debt, or attended, or was represented before the register. The only questions, therefore, which could properly come up before the register, were questions as to the petition and schedules, and questions under the twelfth section of the Act, connected with the return by the marshal of the warrant and of his doings thereon, and as to whether the notice to the creditors had been given as required in the warrant. It is not proper for the register to certify to the court for decision every question which the bankrupt or any other party may choose to raise. The fourth and sixth sections of the Act contemplate the certifying only of questions which actually arise. The questions which can be certified, are: (1.) Any issue of fact or of law raised and contested by any party to the proceedings; but it must be an issue actually raised and existing, and one which has arisen out of proceedings which have taken place, and not an issue likely to arise, or which may be raised thereafter; (2.) Any point or matter arising in the course of the proceedings or upon the result of the proceedings; but it must be a point or matter which has arisen in the course of proceedings which have taken place, or a point or matter which has arisen upon and after the result of proceedings which have taken place, and not a point or matter likely to arise, or which may be raised thereafter, or after a result shall have been arrived at; (3.) Any question, stated by consent by the parties concerned, in a special case; but it must be a question to which there are two parties, and one which has arisen out of proceedings which have taken place. No other practice is sanctioned by the Act, and any other practice would lead to a great waste of time, and to great delay and expense. Nothing is to be certified or

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In the Matter of John Pulver, a Bankrupt.

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decided except what is necessary to be decided to enable the case to progress properly. Questions which thus necessarily arise, are to be decided as, and when, they thus arise, and are not to be anticipated. The register ought to hold parties strictly to this practice, and to refuse to certify any question except in accordance with it. Subject to these principles, the questions certified in this case will be considered.

The bankrupt sets forth eleven debts in his petition. In regard to debts Nos. 1, 2, 3, 4, 5, 7, 8, and 10, he states in his petition that he does not know the present residences of the creditors. In regard to debts Nos. 1, 2, and 4, he states in his petition where he thinks the creditors formerly resided. In regard to debts Nos. 3 and 10, he states in his petition where the creditors formerly resided ; and, in regard to debt No. 10, he further states therein, that the creditor moved from his former residence to the State of Michigan, and that he had heard that he was dead. In regard to debts Nos. 1, 2, 3, 4, 5, 7, and 8, the warrant states that the present residences of the creditors are unknown. In regard to debts Nos. 1, 2, and 4, the warrant states that the petitioner thinks the creditors formerly resided in the places where the petition states he thinks they formerly resided ; and, in regard to debt No. 3, it states that he thinks the creditor formerly resided in the place where the petition states he formerly resided. In regard to debt No. 10, the warrant states as follows : "did live in ——— Michigan ; present residence unknown, if living." In the notices served by the marshal on the creditors, the residences of the creditors in debts Nos. 1, 2, 3, 4, 5, 7, 8, and 10, is stated merely as "unknown." The marshal, in his return to the warrant, states, that, on the 15th of July, 1867, he "sent by mail to the creditors and others named in said warrant, a copy of the notice required thereby to be sent to or served on them, and all of the said notices were according to the directions set out

in said warrant." Upon these facts the various questions certified arise.

1. The first question raised is, whether the bankrupt has, in his petition, stated in a correct form the residence of his creditors. He contends that he is not bound, under the act, to make more than ordinary inquiry as to the residence of the creditors, but is to give the facts according to the best of his knowledge, information at hand, and belief, and he refers to the provision of the eleventh section of the act, which states that he "shall annex to his petition a schedule verified by oath \* \* containing a full and true statement of all his debts, and, as far as possible, to whom due, with the place of residence of each creditor, if known to the debtor, and, if not known, the fact to be so stated and the sum due to each creditor." In regard to this question, the register states that he is of opinion, that the statement, by the petitioner, of the residence of his creditors, is substantially correct and sufficient; that the petitioner states the residences of creditors Nos. 1, 2, 3, 4, and 10, to be unknown to him at the time of filing the petition and schedules, and that his statement of their residences in previous years is surplusage; but that he thinks that the schedule should show that the petitioner has endeavored to ascertain the present residence of such creditors. I concur with the register in all these views. The petition, form No. 1, makes the petitioner swear that schedule A contains a full and true statement of all his debts and (*so far as it is possible to ascertain*) the names and *places of residence* of his creditors." Rule 33 of the "General Orders in Bankruptcy" provides, that "when-ever a debtor shall omit to state, in the schedules annexed to his petition, any of the facts required to be stated concerning his debts or his property, he shall state, either in its appropriate place in the schedules, or in a separate affidavit to be filed with the petition, the reason for the omission, with such particularity as will enable the court

to determine whether to admit the schedules as sufficient, or to require the debtor to make further efforts to complete the same according to the requirements of the law." In view of the eleventh section of the Act, and of form No 1, and of rule 33, whenever a debtor states that the residence of a creditor is not known, he should show, in the schedules or in a separate affidavit, what efforts he has made to ascertain the present residence of the creditor, especially where he shows that he had or has information as to where the creditor once resided. The requirement of the law as interpreted by the Supreme Court by form No. 1, is, that the place of residence of the creditor shall be stated so far as it is *possible* to ascertain it ; and unless the debtor shows, under rule 33, what efforts he has made to ascertain it, the register cannot determine, as he is required to do by rule 33, "whether to admit the schedules as sufficient, or to require the debtor to make *further* efforts to complete the same according to the requirements of the law." This rule implies clearly that the debtor must make efforts to ascertain the present residences of his creditors, and that he cannot satisfy the law by reposing on the knowledge, the information at hand, and the belief which he may possess, without making any effort to ascertain such present residences.

2. The next question is, whether the notice served by the marshal on one of the eleven creditors was defective, and whether, that, being defective, the presumption is that the notices served on the other creditors were also defective. It is alleged by the bankrupt, that the residences are stated by the petitioner in his petition according to the best of his knowledge, information and belief ; that the register, in issuing the warrant, frames the notice to be given to the creditors from the petition ; that the marshal has not, in this case, followed the notice required to be given by him as directed by the warrant ; that the register and not the marshal frames

the notice ; and that the marshal has no option but to follow the notice as given in the warrant, and must follow that *verbatim*. The alleged discrepancy between the notice served and the warrant is alleged to be, that the notice, in the case of debts Nos. 1, 2, 3, 4, and 10, merely states that the residences of the creditors are "unknown," whereas the warrant contains, in regard to those debts, statements as to where the creditors formerly resided, in addition to statements that their present residences are unknown.

In regard to this question, the register states that he is of the opinion that the notice served is not defective ; that the marshal did not err in stating the residence of creditors, Nos. 1, 2, 3, 4, 5, 7, 8, and 10, to be "unknown ;" that such was the necessary inference from the statement of their residences in the schedule and warrant ; that the failure to serve notices upon such creditors (if there was such failure) was not error on the part of the marshal ; and that, the present residence of such creditors being unknown to him, he could not serve them with notice. The register is correct in these views.

3. The next question is stated thus : "If the return of the marshal to the warrant, under form No. 6, General Orders, is not conclusive proof of the regularity of service, &c., of notices (*vide in re William D. Hill*,)\* how is the petitioner to know that the notices, &c., have been regularly served ?" In regard to this question, the register states, that he is of the opinion that, although the return of the messenger may not be conclusive for all purposes, it is authority sufficient for the register to proceed in the matter, and if from such return it appears that the notices have been duly served and published as directed in the warrant, the creditors served should proceed to prove their claims and elect the assignee ; and

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\* *Ante*, p. 321.



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that, if the petitioner obtains further information as to the existence of other creditors not named in the schedules and warrant, or ascertains the actual precise residence of creditors, which had been stated therein to be "unknown," such additional facts may be presented to the register by motion to amend and for leave and time to notify such creditors. The register is correct in these views. In the case of William D. Hill, I held that, under sections twelve and thirteen of the Act, the return by the marshal as to the service of notice on the creditors is not conclusive. The notice required by the warrant must be given, and, until due notice has been given by the marshal, the assignee cannot be chosen or appointed. But the marshal makes his return to the warrant, and from such return it appears whether the due notice required by the twelfth and thirteenth sections has been given. If by such return it appears that due notice has been given, the proceedings go on. If by such return it appears that due notice has not been given, the meeting is adjourned. But such return is not conclusive on the register. For if, although the return states the due giving of notice, it satisfactorily appears that due notice has not been given, the meeting must be adjourned. If, however, the return shows that due notice has been given, and there is no satisfactory evidence *aliunde* to show that due notice has not been given, the return is *prima facie* evidence of the due giving of notice, and is conclusive till rebutted, and is sufficient authority for the register to proceed and cause an assignee to be chosen or appointed.

4. The next question stated is, whether the notices to be published and served on creditors by the marshal as messenger, must be exact copies of the notices as contained in the warrant. In regard to this question, the register states that he is of the opinion that the messenger should copy into the notices to be published and served, the exact language contained in the warrant, but

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that he does not deem an immaterial variance between the warrant and the notice in reference to the residences of creditors, when not calculated to mislead, sufficient to invalidate the proceedings or the discharge. I concur with the register in the view that the messenger ought to copy into the notices, to be published and served, the exact language contained in the warrant, but that the register may disregard an immaterial variance, when not calculated to mislead. In this case, the variance in regard to the residence of the creditors was immaterial, the statement in the schedules and warrant, as to their former residences, being surplusage.

The other questions are not questions which have arisen, but are hypothetical ones, which the court is not called on to decide.

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SEPTEMBER, 1867.

IN THE MATTER OF MORTIMER C. COGSWELL,  
A BANKRUPT,

APPOINTMENT OF ASSIGNEE WHEN NO DEBT HAS BEEN PROVED.

When no creditor who has proved his debt appears at the time and place appointed for the first meeting of creditors, the judge, or, if there be no opposing interest, the register, is to appoint one or more assignees.

In this case the register, at the request of the bankrupt, certified the following question for the opinion of the judge: When no creditor attends at the place and time specified in the warrant and notice for the first meeting of creditors, does the law provide for or require the appointment of an assignee of the bankrupt's estate? The register, in his certificate, said: "My view is, that

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there is not any provision of the Act providing for the appointment of an assignee where there is not a meeting of creditors ; that the only case in which a register is expressly authorized to appoint an assignee is where no choice is made by the creditors at the first meeting (section thirteen) ; that if there is not a meeting, this case does not occur ; that a meeting is an indispensable condition of this power ; that the justices of the Supreme Court seem to have so regarded the law, not having prescribed a form for an appointment by a register, except where no choice is made by the creditors at the meeting (form No. 11) ; that the twenty-third and twenty-ninth sections of the Act, however, clearly contemplate an assignee in every bankruptcy ; that, by necessary implication, there must be a power to appoint ; that in the case under consideration, as the proceeding is before a register, he must possess the power to make the appointment ; and that the opinion of the register, therefore, is, that in the case mentioned in the question, the law does provide for and require the appointment of an assignee of the bankrupt's estate."

BLATCHFORD, J. The register is correct in his conclusion, that in case no creditor attends at the place and time specified in the warrant and notice for the first meeting of creditors, the law provides for and requires the appointment of an assignee of the bankrupt's estate. If the register attends at the place and time specified in the warrant and notice for the first meeting of creditors, and no creditor has proved a debt, the meeting is held, within the purview of the Act, as fully and effectually as if debts had been proved and creditors had attended or been represented at the meeting, and the contingency happens which the thirteenth section speaks of, namely, the contingency that no choice is made by the creditors at the meeting. If creditors have proved their debts, and attend or are represented, but fail to choose an

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assignee, then no choice is made by the creditors. If no creditor has proved a debt, so that no creditor has a right to vote in the choice of an assignee, then equally there is no choice of an assignee made by the creditors. In either case the judge, or, if there be no opposing interest, the register is to appoint one or more assignees.

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SEPTEMBER, 1867.

## IN THE MATTER OF JOHN BELLAMY, A BANKRUPT.

**BANKRUPTCY PRACTICE.—POWER OF REGISTER.—ACCOUNT.—PETITION.—FORM No. 51.—TIME OF PUBLICATION.—ORDERS FOR EXAMINATION.**

Under § 4 of the Bankruptcy Act and rule 5 of the General Orders in Bankruptcy, a register in bankruptcy has power to make an order requiring an assignee in bankruptcy to file the account required by § 28 of the Act. If no assets have come to the hands of the assignee, form No. 35 is such account; but if assets have come to his hands, forms Nos. 37 and 38 constitute it.

It is not necessary for the bankrupt, on presenting the petition, form No. 51, to produce the assignee's return, form No. 35, or any evidence other than the statement in the petition that no debts have been proved, or that no assets have come to the assignee's hands.

Publication "once a week for three successive weeks," means publication once in every seven days for three successive periods of seven days, so that the interval between any two of the publications shall not be less than seven days, and the interval between the last publication and any proceeding dependent upon the publication shall not be less than seven days.

A register has power to make the order to show cause (form No. 51) there being no opposition, if, under § 4 of the Act, he is directed to make it by the judge; and the order referring the case to him may be considered as giving such direction.

Orders for the examination of bankrupts, or their wives or other witnesses, are summonses under § 26; and, under rule 2 of the General Orders, blanks of form

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In the Matter of John Bellamy, a Bankrupt.

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No. 45 not filled up, but signed by the clerk and bearing the seal of the court may be given by the clerk to the registers.

BLATCHFORD, J. In this case the register certifies four questions for decision by the court. An assignee was duly elected by the creditors of the bankrupt at the first meeting of the creditors, and appeared in person before the register. The bankrupt applied to the register by petition, duly verified, and drawn strictly in compliance with form No. 51, for the order to show cause in form No. 51. The petition sets forth that the bankrupt has no property, real or personal, of any kind, and that none has come to the hands of the assignee, and that more than sixty days have elapsed since the adjudication of bankruptcy. The notice required by the Act of the appointment of the assignee was published on the 16th, 19th, and 26th of August, 1867, but no return has been made by the assignee as prescribed by form No. 35. On the foregoing facts the four questions are presented.

1. Can the register (assuming that no assets have come to the hands of the assignee), by a common order, require him to make the return under oath prescribed in form No. 35? As to this question, the register says, that it would be no violent presumption to suppose the case of an elected assignee who should be unfriendly to the bankrupt, having found no assets, and refusing to go before the register and make the oath contemplated in form No. 35; that in that case the court must be applied to, in case the register has no power to compel the assignee by order; that in case there be no opposing party, it would not seem to be necessary to trouble the court by applying to it for such an order; and that in all such cases of obvious duty, the register may be presumed to act by direction of the court, as the court.

I am of opinion that the register, under the power given to him by section four of the Act, and by rule 5 of

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the "General Orders in Bankruptcy," to audit and pass the accounts of assignees, has power to make an order requiring the assignee to submit to the court, and file, the account required by section twenty-eight of the Act. In a case where no assets have come to the hands of the assignee, form No. 35 is such account. In a case where assets have come to the hands of the assignee, forms Nos. 37 and 38 constitute such account.

2. Is a return according to form No. 35 necessary before the granting of the order to show cause, provided for in section twenty-nine of the Act, form No. 51, that is, the order to show cause why a discharge should not be granted to the bankrupt? As to this question, the register says that the form clearly contemplates the practice of basing the sixty days' discharge upon evidence derived from the assignee and not from the bankrupt; that such evidence from the assignee would seem to be the highest evidence of the fact; and that, indeed, it is a fact of which the bankrupt may, in some cases, be ignorant.

I think that form No. 51 does not contemplate the practice of basing such order to show cause upon evidence derived from the assignee and not from the bankrupt. The twenty-ninth section of the Act provides that, "at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts." Form No. 51 embraces the petition of the bankrupt for his discharge, and the order to show cause thereon. The petition is one to be made and signed by the bankrupt, and the form contains at its foot this memorandum: "If this petition is filed within less than six months after the filing of the original petition, it should state that no

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debts have been proved against the bankrupt, or that no assets have come to the hands of the assignee." It is sufficient, therefore, when the discharge is applied for after the expiration of sixty days from the adjudication of bankruptcy, and before the expiration of six months from such adjudication, for the bankrupt to state in his petition, form No. 51, that no debts have been proved against him, or that no assets have come to the hands of his assignee. It is not necessary, on presenting such petition, to produce the assignee's return, form No. 35, nor any certificate from the assignee that no assets have come to his hands, nor any evidence other than the mere statement in such petition that no debts have been proved against the bankrupt, or that no assets have come to the hands of his assignee. The return, form No. 35, is a return to be made under section twenty-eight, preparatory to a final dividend and to an application by the assignee for his discharge, and is to be made after the third meeting of creditors. Of course, on the return of the order to show cause, made on the bankrupt's application for his discharge, if such application is made after the expiration of sixty days from the adjudication of bankruptcy and before the expiration of six months from such adjudication, the court will not grant the discharge without satisfactory evidence that no debts have been proved against the bankrupt, or that no assets have come to the hands of the assignee. The highest evidence as to debts is, by section twenty-two of the Act, required to be in the hands of the assignee, and the highest evidence as to assets must necessarily be in his hands. The evidence must, therefore, come from the assignee. But a return according to form No. 35 is not necessary, before the granting of the order to show cause provided for in section twenty-nine of the Act, form No. 51, that is, the order to show cause why a discharge should not be granted to the bankrupt.

3. Has the notice of the appointment of the assignee

been published in the present case, as required by the Act, and, if it has not, is such error fatal to the application for the discharge? The notice was published on the 16th, 19th, and 26th of August, 1867. As to this question, the register says, that the fourteenth section of the Act provides that the publication "shall be" once a week for three successive weeks; that the notice in this case was published the first time on Friday of one week, the second time on Monday of the next week, and the third time on Monday of the week after; that this is no doubt one publication in each week of three successive weeks, although a week or seven days did not elapse between the first and second publications; that the letter of the statute does not require that such an interval should elapse, yet it could not be pretended that a publication on a Saturday and another on the succeeding Monday was a publication "once a week for two successive weeks;" that the cases of *The People v. Demarest* (10 Abb. Pr. Rep. 468) and *Bunce v. Reed* (16 Barb. S. C. Rep. 350) seem to settle the question, as only ten days intervened between the first and the last publications in the present case; that he thinks it clear, therefore, that the publication was insufficient; and that, if so, a new order of publication must be made.

The fourteenth section of the Act requires that "the assignee shall immediately give notice of his appointment by publication, at least once a week for three successive weeks, in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district, or in that portion of the district in which the bankrupt and his creditors shall reside." Rule 10 of this court provides, that "notice of the appointment of an assignee shall be given by publication once a week for three successive weeks, in two of the newspapers named in rule 21, at least one of which shall be a newspaper published in the city and county of New York, such newspapers to be



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selected by the register, with due regard to the requirements of section fourteen of the Act." A requirement that a notice shall be published once a week for three successive weeks, is a requirement that it shall be published once in every seven days, for three successive periods of seven days each; that the interval between any two of the publications shall not be less than seven days; that the interval between the last publication and any proceeding dependent on the publication shall not be less than seven days; and that the publications shall be three in number, and no more and no less. In the present case, the notice of the appointment of the assignee was not published as required by the Act and by rule 10 of this court; and my opinion is that, under section thirty-two of the Act, no discharge can be granted in this case until such notice is duly published.

4. Shall the order to show cause, form No. 51, there being no opposition, be made by the register? As to this question, the register says, that the Act provides, section twenty-nine, that "the court" shall make the order; that it seems to be nothing more than an order of course, involving no discretion, nothing but mere obedience; that section four of the Act, after prescribing what a register may do in all cases, goes on to prescribe what, in addition to that, he may do in non-contested cases, that the language is, "sit in chambers and dispatch there such part of the administrative business of the court, and such uncontested matters as shall be defined in general rules and orders, or as the District Judge shall in any particular matter direct;" that all the duties of the register may be regarded as being done while he is sitting in chambers; that the language of the Act is not confined to a particular case, but extends to a "particular matter" or subject; that it would seem, therefore, that it is somewhat in the discretion of the court to do these acts in person or by its registers; that

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it is more convenient that this order to show cause be made by the register to whom the case is referred ; and that it is true that the word " court " is used in the Act, but that if the words " court " and " judge " in all uncontested cases, where there is no opposition or adverse appearance, be not construed to mean " register," whenever the court shall, in its discretion, see fit to devolve a duty upon the registers, the Act will, by construction, become not only a medley of confused and inharmonious provisions, but the court will load itself with ministerial duties which will in the end be found to be both laborious to itself and inconvenient to its suitors.

I do not see that, by the Act or by the general orders made by the Justices of the Supreme Court, power is specifically given to the register to make this order to show cause. But as the order is one made *ex parte*, and is, consequently, so far as the making of it is concerned, uncontested, I think that a register may make it, if, under section four of the Act, he is directed by the District Judge to make it. It is very proper and convenient that the register charged with the case should make the order. This decision will, therefore, be regarded as a direction that the register to whom a case is referred shall have power to make the order in form No. 51, under section twenty-nine of the Act.

The register also states, that the call for orders to examine bankrupts, their wives, and other witnesses before the registers, is becoming so frequent, that it would be exceedingly irksome to be compelled to fill out each order (form No. 45) and dispatch a messenger to the clerk's office to get the signature of the clerk and the seal of the court, and keep the applicant waiting meanwhile ; that he, the register, sent a quantity of blank orders, form No. 45, to the clerk's office, to procure the signature of the clerk and the seal of the court to them, but the clerk refused to sign or seal the orders in blank, or unless they were filled up ; and that, in view

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In the Matter of William Weyhausen and Philip Freytag, Bankrupts.

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of the provisions of rule 2 of the General Orders, he, the register, thinks the clerk is mistaken. The register says that he wishes to submit this question for the decision of the judge. An order, under section twenty-six of the Act, requiring the bankrupt to attend and be examined, may properly be regarded as a summons; and so may an order, under the same section, requiring the wife of the bankrupt to attend and be examined as a witness; and so may an order, under the same section, requiring the attendance of any other person as a witness. The service upon the wife, or other person, of the order, is a summoning of him or her under section twenty-six, so that, for a failure to attend under such order, the party may be arrested. The order, form No. 45, is a summons, when served, quite as much as is the summons, form No. 48. Being a summons, it falls within rule 2 of the "General Orders in Bankruptcy;" and, therefore, under that rule, blanks of form No. 45, not filled up, but having the signature of the clerk and the seal of the court, will, upon application, be furnished by the clerk to the registers.

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SEPTEMBER, 1867.

IN THE MATTER OF WILLIAM WEYHAUSEN  
AND PHILIP FREYTAG, BANKRUPTS.

INVOLUNTARY BANKRUPTCY—APPEARANCE BY ATTORNEY.

In proceedings in involuntary bankruptcy, the order to show cause having been served on only one of two debtors, and no notice having been published as to the other.

*Held*, That the appearance of the debtor not served need not be personal, but might be by attorney.

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In the Matter of William H. Knoepfel, a Bankrupt.

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In this case, which was a petition in involuntary bankruptcy, the order to show cause was served on only one of two debtors, and no publication of notice as to the other had been made.

Both debtors however, appeared by the same attorney, and desired to waive any other notice.

Doubt was raised whether the debtor not served could appear by attorney, and whether he must not appear in person.

After hearing counsel, the court (BLATCHFORD, J.) held that, under the forty-first and forty-second sections of the Act, the appearance by attorney, of the debtor not served, might be entered.

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SEPTEMBER, 1867.

## IN THE MATTER OF WILLIAM H. KNOEPFEL, A BANKRUPT.

### POWER OF ATTORNEY.—PROOF OF DEBT.—STATUTE OF LIMITATIONS.

A power of attorney, given to one Loeffler, before the passage of the Bankruptcy Act, authorized the attorney in fact, "to ask, demand, collect, and receive," all debts due to the firm which gave the power, "and, for that purpose, to sign our name to any agreement of compromise or settlement, or any other paper writing proper or necessary for the purpose aforesaid," with a full power of substitution. Under this power, the attorney in fact executed a letter of attorney authorizing an attorney-at-law to appear at the first meeting of the creditors of a bankrupt and vote in behalf of his principals, who were creditors, in the choice of an assignee. The bankrupt objected to the appearance and the question was certified to the court:

*Held*, That the mere fact that the power of attorney was given before the passage of the Act was not enough to show that it did not confer the necessary power upon Loeffler to appoint an attorney to act for his principals. Whether it conferred that power depended upon its language.

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In the Matter of William H. Knoepfel, a Bankrupt.

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That the signing of the names of the principals to a paper drawn according to form No. 15, choosing an assignee of the estate of a debtor to the principals, was the signing of a paper which was proper for the purpose of collecting the debt due to the principals, and that this power of attorney gave to Loeffler, or his duly appointed substitute, authority to act for them in the matter in question.

At the first meeting of creditors, proofs were offered of the claims of two creditors, for both of which the debtor had given notes, on one of which a judgment had been obtained. The bankrupt demanded that the notes be produced, to which the creditors objected.

The bankrupt also objected to the proof of one of the debts, on the ground that it appeared to have been barred by the statute of limitations of the State of New York, where the debt was incurred.

*Held*, That where a debt sought to be proved is evidenced by a note, the note must be produced and exhibited when required by the register, the assignee, or the bankrupt, on proper occasions. Not so, if a judgment has been recovered on it, for then the note is merged in the judgment, as a debt of a higher character.

That a proof of debt is not open to objection because it appears that the statute of limitations, if set up, would be a good defence to the claim. The statute of limitations, if relied on as a defence, must be set up affirmatively by a debtor.

In this case, at an adjourned meeting of the creditors, held August 7th, 1867, Mr. G. A. Seixas, of counsel for Gourd, Freres & Co., creditors, produced a letter of attorney in due form, authorizing him to appear at the meeting and vote on their behalf, in the choice of assignee. This letter was executed by August Loeffler, as attorney in fact, for Gourd, Freres & Co., under a power of attorney executed by them to Loeffler, dated May 17th, 1864. This power constituted Loeffler attorney, "to ask, demand, collect and receive all debts due our said firm, and any or all such debts to compromise and settle, release and discharge, and, for that purpose, to sign our name to any agreement of compromise or settlement, or any other paper writing proper or necessary for the purpose aforesaid," with full power of substitution. The bankrupt objected, on the following grounds, to Mr. Seixas' right to appear and vote for Gourd, Freres & Co., under such letter of attorney, namely: (1) Because the power of attorney to Loeffler bore date before the Bankruptcy Act was passed,

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In the Matter of William H. Knoepfel, a Bankrupt.

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and, therefore, it could not have been intended that Loeffler should represent the firm in matters under the Act; (2) Because the language of the power could not be construed to include such an authority. The bankrupt asked that this question be certified to the judge for his decision.

At the meeting, proofs were offered of the claims of two creditors, Gourd, Freres & Co., and Spies, Christ & Jay. The proofs showed that promissory notes had been given by the debtor to the creditors for the debts, and that the last named firm had recovered a judgment against the debtor on the note given to them. The bankrupt, at the meeting, demanded the production of the notes. The creditors refused to produce them, insisting that such production was unnecessary. The register thought otherwise, and the creditors asked that the question be certified to the judge for his decision.

As to the proof of the debt due to Gourd, Freres & Co., the bankrupt objected to it, that, while no judgment appeared to have been recovered on it, it was, upon its face, barred by the statute of limitations of the State of New York, all the notes embraced in it having been due before October, 1854, and no payments having been made thereon, and the debt having been incurred in the State of New York. But the creditors insisted that the statute must be pleaded by the debtor, when the creditors' reply might show that the statute did not operate. The bankrupt insisted, that the proof of the claim must anticipate the plea of the statute, and set forth the facts taking the case out of the statute. The register thought otherwise, and the bankrupt asked that the question be certified to the judge.

BLATCHFORD, J. The register does not state, as prescribed in rule 19 of this court, his opinion on the question raised as to the power of attorney to Loeffler, nor

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In the Matter of William H. Knoepfel, a Bankrupt.

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does it appear whether an assignee was elected at the meeting, and, if so, whether Mr. Seixas was permitted to vote on behalf of Gourd, Freres & Co., or whether the meeting was adjourned. But still I proceed to decide the question raised. I do not think that the mere fact that the power to Loeffler bears date before the passage of the Bankruptcy Act, is sufficient to show that such power cannot or does not confer authority on Loeffler to act for the firm, either personally, or by a substituted authority in proceedings under that Act. The question whether the power has that scope depends upon its language. Even though it was given before the Act was passed, it may be broad enough, in its terms, to cover the right of representing the firm, as creditors, in proceedings under the Act.

The power authorizes Loeffler to sign the name of the firm to any paper writing proper or necessary for the purpose of collecting and receiving any debt due to the firm. The signing the name of the firm to a paper drawn according to form No. 15, choosing an assignee of the estate of a debtor to the firm, who has gone into bankruptcy, is the signing of a paper writing which is proper for the purpose of collecting the debt due from such debtor to the firm. I am, therefore, of opinion, that the language of the power to Loeffler is sufficient to authorize him, or his duly appointed substitute, to act for the firm in the matter in question.

I am also, of opinion, that, where a debt sought to be proved is evidenced by a promissory note, the note must be produced and exhibited when required by the register, the assignee, or the bankrupt, on proper occasions. Thus, if a proof of debt is handed in to the register at the first meeting of creditors, and it appears that there is a note for the debt, it must be exhibited, if called for. So, also, after the proof of debt is, under section twenty-two, delivered or sent to the assignee, he can require a note, which exists for the debt, to be produced, before paying

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any dividend on it. Forms Nos. 31 and 33 distinctly show that a bill or note or other security held for a debt is to be exhibited at the time the proof of the debt is handed in, and forms Nos. 27 and 31 show that it is to be again exhibited before a dividend is paid on it. In the present case, therefore, the notes held by the creditors, if their claims rest on the notes, ought to have been produced, when called for by the bankrupt. If, however, the claim of Spies, Christ & Jay rests on a judgment on a note, and their proof of debt is founded on the judgment and not on the note, then it was not necessary to produce the note. The note was merged in the judgment, as a debt of a higher character.

A proof of debt is not open to objection because it appears on its face that the statute of limitations, if set up, would be a good defence to the claim. The proof of claim need not anticipate the defence or give proof of facts to take the case out of the statute. It is a universal rule, that a statute of limitations may be waived, and must, when relied on as a defence, be set up affirmatively by a debtor. In this case, therefore, the objection to the proof of debt made by Gourd, Freres & Co. is not tenable.

SEPTEMBER, 1867.

## IN THE MATTER OF ABRAHAM E. HASBROUCK, A BANKRUPT.

### SURRENDER OF BANKRUPT'S ESTATE.

On the adjudication of bankruptcy, the register is authorized and required to receive the surrender of the bankrupt's estate, and to keep the property safely, until it can be turned over to the assignee.



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In this case, on the appearance of the bankrupt before the register to whom the case was referred, he requested the register to take possession of his property, consisting of a store of goods at Lloyd, in Ulster county, set forth in the bankrupt's schedules as of the value of \$3,336.08. The register declined to comply with the request of the bankrupt until he should be advised by the court of his duty to do so. The register stated to the court that the bankrupt's request was based upon the following words, contained in section four of the Act: "to receive the surrender of any bankrupt;" that there is nothing else in the Act of that tenor, nor are there in it any provisions for the execution of such a trust by the register; that, by rule 13 of the "General Orders in Bankruptcy," the marshal is authorized to take possession of property, but the register thinks that that provision applies only to cases of involuntary bankruptcy; and that, as the property is or ought to be in the custody of the court from and after the adjudication of bankruptcy, it was important to know who is to be responsible for it.

BLATCHFORD, J. In a case of voluntary bankruptcy, the debtor is required, by section eleven of the Act, to state in his petition "his willingness to surrender all his estate and effects for the benefit of his creditors." By section four of the Act, the register has the power, and it is made his duty, to "receive the surrender" of the bankrupt, and "to grant protection." These are all the provisions there are in the Act in regard to surrender or protection. Form No. 1 contains an averment that the debtor "is willing to surrender all his estate and effects for the benefit of his creditors." Rule 5 of the "General Orders in Bankruptcy" provides, that a register may conduct proceedings in relation to the following matters, among others, when uncontested, namely, "receiving the surrender of a bankrupt," and "granting protection thereon." In the present case, the bankrupt's

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petition was referred to the register by form No. 4. The register does not state whether he has made an adjudication of bankruptcy according to form No. 5, and issued a warrant according to form No. 6, but I assume that he has done so. There is nothing in such warrant authorizing the marshal to take possession of the property of the bankrupt, nor is there any provision in the Act authorizing or requiring the marshal to take possession of the property of a voluntary bankrupt. After the warrant, form No. 6, is issued, notices of a meeting of creditors are to be given, which meeting may, under section eleven of the Act, be held at as late a period as ninety days after the adjudication of bankruptcy and the issuing of the warrant. At such meeting an assignee is to be elected or appointed. The assignee has five days in which to accept the trust, and, as soon as he is appointed and qualified, an assignment of the bankrupt's estate is to be made to him by the judge or the register; and section fourteen provides, that "such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee." It results, from these provisions, that, during the interval between the adjudication of bankruptcy, in the case of a voluntary bankrupt, and the delivery of the assignment to the assignee, and which interval may be as much as ninety-five days, or even more, the property of the bankrupt cannot, under the Act, be put into the possession or custody of the court, or of any officer acting under the Bankruptcy Act, but must remain in the possession and control of the bankrupt, unless it can, during that interval, be kept in the temporary custody of the register, to be handed over by him to the assignee, when elected or appointed. And there seems to be no scope for the operation of the provision in regard to the surrender of a bankrupt, unless it is construed to mean, that a voluntary bankrupt may

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place his estate in the possession of the register, as soon as he is adjudicated a bankrupt.

In the case of an involuntary bankrupt, section forty-two of the Act requires that the warrant, to be issued to the marshal as soon as the debtor is adjudged to be a bankrupt, shall direct the marshal to take possession of the estate of the debtor, and form No. 59 contains such a direction. The provision of rule 13, of the "General Orders in Bankruptcy," which says, that "it shall be the duty of the marshal, as messenger, to take possession of the property of the bankrupt, and to prepare, within three days from the time of taking such possession, a complete inventory of all the property, and to return it as soon as completed," applies only to a case where a warrant is issued to the marshal to seize the property, and, therefore, not to a case of voluntary bankruptcy. In analogy to this taking possession by the court of the estate of a bankrupt, in a case of involuntary bankruptcy, as soon as an adjudication of bankruptcy is made, the Act contemplates that a voluntary bankrupt, who states, in his petition, his willingness to surrender all his estate and effects for the benefit of his creditors, may, as soon as he is adjudged to be a bankrupt, surrender his property into the hands of the court, by surrendering it to the register who has made the adjudication of bankruptcy.

I am, therefore, of the opinion, that if the debtor, in this case, has been adjudged a bankrupt, and requests the register to receive a surrender of his property, the register is authorized and required to receive such surrender, and to keep the property safely, until it can be turned over to the assignee. It is true that the Act contains no special provisions for the execution of the trust, but the power of the court extends, by section one of the Act, "to all acts, matters, and things to be done under and in virtue of the bankruptcy," and the register exercises the power of the court in regard to the property.

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In the Matter of James M. Lowerre, a Bankrupt.

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SEPTEMBER, 1867.

IN THE MATTER OF JAMES M. LOWERRE,  
A BANKRUPT.

## WITHDRAWING PROOF OF CLAIM.

Where an agent of a creditor, who had filed proof of the creditor's debt against the bankrupt, asked leave to withdraw the proof of debt, it being alleged that certain facts had been by error omitted :

*Held*, That the proof of debt could not be withdrawn, but that the creditor ought to be allowed and required to amend his proof.

In this case, at the first meeting of creditors, Nathaniel Niles, as agent for Edward W. Seabury, proved and filed a claim of Seabury against the bankrupt, but he was not authorized, by any letter of attorney from Seabury, to vote on behalf of Seabury, in the choice of an assignee. Niles then asked leave to withdraw from file the proof of Seabury's claim. To this the bankrupt objected. It was stated, that Seabury had accepted notes of the bankrupt for \$5,000, and agreed to give him a full discharge when they were paid, that the notes were not yet due, and that these facts had, through an error on the part of Niles, been omitted from his deposition in proof of Seabury's claim. On this ground, in part, Niles asked leave to withdraw the deposition. The register thought that Niles ought to be allowed to amend the proof of Seabury's claim, but that he could not, under the circumstances, withdraw from the files the proof already put in. Niles insisted upon his right to withdraw the deposition from the files, and asked that the question should be certified to the judge for his decision.

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In the Matter of Augustus A. Bliss, a Bankrupt.

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BLATCHFORD, J. The register is correct in his view. Neither the proof of debt nor the deposition can be withdrawn, but the party ought to be allowed and required to amend his proof.

SEPTEMBER, 1867.

IN THE MATTER OF AUGUSTUS A. BLISS,  
A BANKRUPT.

ASSIGNEE.—DUTY OF REGISTER.

A register should state to the judge any reasons which he may know to exist, why an assignee elected or appointed should not be approved.

In this case, the register certified to the court the question whether, if he was satisfied that the bankrupt had, through his friends, chosen an assignee in his own interest, he should certify his opinion and the grounds of it to the court.

BLATCHFORD, J. When the register is satisfied that any reasons exist, why an assignee elected or appointed should not be approved by the judge, it is his duty to state such reasons fully, in submitting to the judge the question of approval.

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In the Matter of John Riley, on Habeas Corpus.

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SEPTEMBER, 1867.

## IN THE MATTER OF JOHN RILEY, ON HABEAS CORPUS.

MILITARY ENLISTMENT.—OATH OF RECRUIT.—RECRUIT OVER EIGHTEEN YEARS OF AGE.—POWER OF COURT.—DUTY OF SECRETARY OF WAR.

The Oath taken by a recruit, on his enlistment into the army of the United States, as to his age, is conclusive as against himself and every one else. Enlistments of minors over eighteen years of age, into the army of the United States, without the consent of their parents, masters or guardians, are valid, but it is not lawful to muster into the service a person under eighteen years of age.

The whole power of discharging minors from the army, is given to the Secretary of War, and cognizance of such matters is taken from the Courts.

The writ of *habeas corpus* in this case was issued on a petition setting forth that Riley was illegally restrained by the officer in command of the military quarters at Willet's Point, within this district; that the cause or pretence of such restraint was, that Riley enlisted in the military service of the United States, at Boston, on or about October 23d, 1866; that Riley was not eighteen years of age at the time of his enlistment; that Riley's father resided at Nashua, New Hampshire, and did not consent to the enlistment of his son or have any knowledge thereof; and that the enlistment was void as to the father.

The return to the writ set forth that Riley was a soldier duly enlisted in the service of the United States; that he enlisted October 23d, 1866, at Boston, for three years; and that he had never been discharged from service. The original enlistment paper of Riley was submitted to the Court with the return. In it Riley made oath that he was, on the 23d of October, 1866, "aged

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nineteen years." There was no traverse of the return, and no testimony was given except what was contained on the face of the foregoing papers.

On the part of Riley it was contended, that the enlistment was void *ab initio*, because he was a minor under the age of twenty one years at the time, and enlisted without the consent of his father, and that the oath taken by him on his enlistment was not conclusive on his father, but was at most only conclusive on himself.

BLATCHFORD, J. I have heretofore decided, in the case of John Edward Cline, on *habeas corpus*, (*ante*, p. 338), that the provision of the second section of the Act of February 13th, 1862, (12 *U. S. Stat. at Large*, 339), which declares that "the oath of enlistment taken by the recruit shall be conclusive as to his age," is as conclusive and binding upon this Court, as it is upon the recruit or upon the United States, and that the intent of Congress manifestly was, that no evidence should be received to contradict a statement as to the age of the recruit, contained in the oath taken by him on his enlistment. (*Case of George Reilly, before Judge Daly, New York Common Pleas, March, 1867; Cases of Michael J. Conley and John Jump, before Judge Betts, in this Court, January, 1867*). There is no foundation for the suggestion, that the oath taken by a minor recruit, though it may be conclusive as to the recruit himself, is not conclusive as to his parent. The idea on which that claim is made is, that the minor owes service to his parent and cannot lawfully contract, against or without the consent of his parent, to render his services to another. But such duty of the minor to his parent is subordinate to the paramount right of the Government to demand his military services. The Constitution of the United States has conferred specifically upon the Congress of the United States the power to raise armies. It is a necessary incident of such power, that Congress has authority to declare who may be en-

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listed as soldiers, and what age shall be considered an age of consent to such enlistment. Congress may prescribe a standard of height, age, birth place, and other qualifications. It may, in the case of a minor, require the consent of his parents to his enlistment, or it may omit to require such consent. It may fix the age of sixteen, or the age of eighteen, or any other age, either above or below twenty-one, as the age of enlistment. When the age is fixed, it may declare what shall be considered conclusive evidence of such age, just as it may declare what shall be considered conclusive evidence of the consent of the recruit to his enlistment. The provision of law, that "the oath of enlistment taken by the recruit shall be conclusive as to his age," means, that where the recruit, on his enlistment, takes an oath which shows that he is of the age at which the law authorizes an enlistment, such oath shall be conclusive evidence as against himself, his parents, the United States, the officer who enlisted him, and all the world, that he is of such age; and the enlistment is binding and valid so far as the question of the age of the recruit is concerned.

In the present case, the recruit having sworn, on his enlistment, that he was nineteen years of age, the only questions presented for consideration are, whether the enlistment of a recruit of that age is authorized by the laws of the United States, and, if it is, whether the consent of his parents to his enlistment is necessary. The determination of these questions requires an examination of the legislation of the United States on this subject.

The Act of March 16th, 1802, (*2 U. S. Stat. at Large*, 132), entitled, "An Act fixing the military peace establishment of the United States," provided, in section eleven, for the enlistment of persons between the ages of eighteen and thirty-five years, and declared "that no person under the age of twenty-one years shall be enlisted by any officer, or held in the service of the United States, without the consent of his parent, or guardian, or master, first had



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and obtained, if any he have." Acts declared to be "in addition" to the Act of March 16th, 1802, were passed on the 28th of February, 1803, (2 *U. S. Stat. at Large*, 206), and the 26th of March, 1804, (*Id.*, 290). These Acts merely provided for additions to the military force. On the 12th of April, 1808, an Act was passed entitled, "An Act to raise for a limited time an additional military force." (*Id.*, 481). This Act provided that, in addition to the then existing military establishment of the United States, there should be raised certain regiments of soldiers. Section five of that Act declared, that the provisions of the Act of March 16th, 1802, relative to the age of recruits, should be in force and applied to all persons, matters and things within the intent and meaning of such Act of 1808, in the same manner as if they were inserted at large in the same. On the 24th of December, 1811, an Act entitled, "An Act for completing the existing military establishment" was passed. (*Id.*, 669). This Act enacted, that the military establishment, as then authorized by law, that is, by the Acts above referred to should be immediately completed. On the 11th of January, 1812, an Act was passed entitled, "An Act to raise an additional military force." (*Id.*, 671). This Act provided for raising thirteen regiments of soldiers. The 11th section of this Act declared, "that no person under the age of twenty-one years shall be enlisted by any officer, or held in the service of the United States, without the consent, in writing, of his parent, guardian or master, first had and obtained, if any he have." This provision of the Act of 1812 was substantially the same as that of the Acts of 1802 and 1808, with the addition, that the consent of the parent, guardian or master of the minor was required to be in writing. An Act supplementary to the Act of April 12th, 1808, was passed on the 24th of February, 1812. (*Id.*, 685). An Act supplementary to the Act of January 11th, 1812, was passed on the 17th of March, 1812. (*Id.*, 695). An Act in addition

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to the Act of January 11th, 1812, was passed on the 8th of April, 1812. (*Id.*, 704). These three Acts contain no provisions bearing on the question under consideration, and are only cited as showing that the Acts to which they were supplementary and additional were still in force.

On the 26th of June, 1812, an Act was passed entitled, "An Act for the more perfect organization of the Army of the United States." (*Id.*, 764). This Act declared of how many regiments the infantry of the army should consist, and of what a regiment of infantry should consist, and of what a troop of cavalry should consist. It also recognized the Acts of April 12th, 1808, and January 11th, 1812, as in force. It also declared, (section five,) that the military establishment authorized by law previous to the 12th of April, 1808, and the additional military force raised by virtue of that Act, should be incorporated. On the 20th of January, 1813, an Act was passed, "supplementary to the Act of June 26th, 1812." (*Id.*, 791). This Act provided for an advance of pay to recruits "in order to complete the present military establishment to the full number authorized by law, with the greatest possible despatch." It also enacted, (section 5,) that the recruiting officer should be entitled to receive for every effective able bodied man who should be duly enlisted after February 1st, 1813, for five years or during the war, and mustered, "and between the ages of eighteen and forty-five years," the sum of four dollars, and "that no person under the age of twenty-one years shall be enlisted by any officer, or held in the service of the United States, without the consent, in writing, of his parent, guardian, or master, first had and obtained, if any he have." The language of this restriction was the same as that of the Act of January 11th, 1812. On the 29th of January, 1813, an Act was passed, additional to the Act of January 11th, 1812. (*Id.*, 794). This Act provided, that, in addition to the then existing military establishment of the United

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States, there should be raised certain additional regiments of infantry, to be enlisted for one year. It also enacted, (section seven,) that the recruiting officers, employed in recruiting the force authorized by the Act, should be entitled to receive for every person enlisted by them into the service, for the term specified, and approved by the commanding officer of the regiment, and "between the ages of eighteen and forty-five years," the sum of two dollars. The same section contained a provision in regard to the consent in the case of persons under the age of twenty-one years, in the same words as the provisions in the Acts of January 11th, 1812, and January 20th, 1813. On the 5th of July, 1813, an Act was passed amendatory of the Act of January 29th, 1813. (3 *Id.*, 3). It provided, that five of the regiments authorized to be raised by the Act of January 29th, 1813, might be enlisted for the war. An Act passed January 28th, 1814, (*Id.*, 96), authorized the enlistment for five years, or during the war, of the regiments then authorized by law to be enlisted for one year; and the fifteenth section of the Act of March 30th, 1814, (*Id.*, 113,) enacted, that the five regiments referred to in the Act of July 5th, 1813, might be enlisted, at the option of the recruit, "for five years, or for and during the war."

Such was the condition of the law on the 10th of December, 1814. Enlistments of soldiers between the ages of eighteen and forty-five years were authorized, but, if the recruit was under the age of twenty-one years, the previous consent in writing of his parent, guardian, or master, if he had one, was necessary to the validity of the enlistment. On the 10th of December, 1814, an Act was passed, entitled, "An Act making further provisions for filling the ranks of the army of the United States." (*Id.*, 146). The first section provides, "that, from and after the passing of this Act, each and every commissioned officer who shall be employed in the recruiting service, shall be, and he hereby is, authorized to enlist into the

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army of the United States, any free, effective, able-bodied man, between the ages of eighteen and fifty years; which enlistment shall be absolute and binding upon all persons under the age of twenty-one years, as well as upon persons of full age, such recruiting officer having complied with all the requisitions of the laws regulating the recruiting service." The second section provides, "that it shall not be lawful for any recruiting officer to pay or deliver to a recruit under the age of twenty-one years, to be enlisted by virtue of this Act, any bounty or clothing, or in any manner restrain him of his liberty, until after the expiration of four days from the time of his enlistment, and it shall be lawful for the said recruit, at any time during the said four days, to reconsider and withdraw his enlistment, and thereupon he shall forthwith be discharged and exonerated from the same." The third section repeals so much of the fifth section of the Act of January 20th, 1813, as required the consent in writing of the parent, guardian or master, to authorize the enlistments of persons under the age of twenty-one years, and contains a proviso that, in case of the enlistment of an apprentice held to serve at the time for any term between two and three years, his master shall be entitled to one half of his money-bounty, and if held to serve between one and two years, to one-third, and if held to serve one year or less, to one-fourth. The effect of these provisions of the Act of December 10th, 1814, was, to authorize the enlistment of soldiers between the ages of eighteen and fifty years, and to make the enlistment of persons under the age of twenty-one years, without the consent of their parents, guardians or masters, as binding upon the recruits, and their parents, guardians and masters, and the United States, and all the world, as if the recruits were persons of full age. It is true, that no previous provision, requiring the consent in writing of the parent, guardian or master, to authorize the enlistment, was expressly repealed, except the provision to

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that effect in the Act of January 20th, 1813. The provisions to that effect in the Acts of March 16th, 1802, April 12th, 1808, January 11th, 1812, and January 29th, 1813, were not expressly repealed. But they were entirely inconsistent with the provisions of the Act of December 10th, 1814. The intention of Congress, as clearly expressed in the Act of 1814, was, to authorize the enlistment of minors over the age of eighteen years, without the consent of their parents, guardians or masters. The provisions of the Act of 1814 being thus entirely inconsistent with those of the Act of January 20th, 1813, the effect would have been to repeal and supersede the provisions of the Act of January 20th, 1813, in regard to consent, even if there had been no express repeal of those provisions. And the Act of 1814 has equally the effect of repealing and superseding the provisions of the Acts of 1802, 1808, and 1812, and January 29th, 1813. The first section of this Act of 1814 is still in force, and, under it, enlistments of minors over the age of eighteen years, without the consent of their parents, guardians or masters, are valid.

On the 28th of September, 1850, an Act was passed entitled, "An Act making appropriations for the support of the army for the year ending the 30th of June, 1851," (9 *Id.* 504), the fifth section of which provided, that it should be the duty of the Secretary of War to order the discharge of any soldier of the army of the United States, who, at the time of his enlistment, was under the age of twenty-one years, upon evidence being produced to him that such enlistment was without the consent of his parent or guardian. This fifth section of the Act of 1850, while it was in force, still left the enlistment, of a minor over the age of eighteen years, without the consent of his parent, guardian or master, valid, as authorized by the Act of 1814, and conferred no authority upon any court to discharge such minor from service, on the ground that he had enlisted without such consent, and that,

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therefore, such enlistment was invalid, but merely imposed on the Secretary of War the duty of discharging a soldier who was a minor at the time of his enlistment, upon evidence that he enlisted without the consent of his parent or guardian. But this provision of the fifth section of the Act of 1850 was expressly repealed by the second section of the Act of February 13th, 1862, (12 *Id.*, 339), which provides, "that the fifth section of the Act of 28th September, 1850, providing for the discharge from the service of minors enlisted without the consent of their parents or guardians, be, and the same hereby is, repealed, provided, that hereafter no person under the age of eighteen shall be mustered into the United States service, and the oath of enlistment taken by the recruit shall be conclusive as to his age." This language of the Act of 1862 shows, that it was the understanding of Congress that minors over the age of eighteen years could lawfully be enlisted and mustered as soldiers into the United States service, without the consent of their parents or guardians, and that they were not to be discharged from service for want of such consent. The repeal of this provision of the Act of 1850 left the first section of the Act of December 10th, 1814, with its effect and operation, as before explained, still in force, and deprived the minor recruit, who had enlisted without the consent of his parent or guardian, and also such parent or guardian, of all means of obtaining a discharge on the ground of such want of consent.

On the 24th of February, 1864, an Act was passed, the twentieth section of which (13 *Id.*, 10), provides, "that the Secretary of War *may* order the discharge of all persons in the military service who are under the age of eighteen years at the time of the application for their discharge, when it shall appear, upon due proof, that such persons are in the service without the consent, either expressed or implied, of their parents or guardians, provided that such persons, their parents or guardians, shall first repay to the Government, and to the State and

local authorities, all bounties and advance pay which may have been paid to them, anything in the Act to which this is an amendment to the contrary notwithstanding." On the 4th of July, 1864, an Act was passed, the fifth section of which (*Id.* 380,) provides, that the twentieth section of the Act of February 24th, 1864, "shall be construed to mean that the Secretary of War *shall* discharge minors under the age of eighteen years, under the circumstances and on the conditions prescribed in said section; and, hereafter, if any officer of the United States shall enlist or muster into the military service any person under the age of sixteen years, with or without the consent of his parent or guardian, such person so enlisted or recruited shall be immediately discharged upon repayment of all bounties received." These provisions of the two Acts of 1864 leave the provisions of the first section of the Act of December 10th, 1814, and of the second section of the Act of February 13th, 1862, in full force. Enlistments of minors over the age of eighteen years, without the consent of their parents, guardians or masters, are valid, and the oath of enlistment taken by the recruit is conclusive as to his age, but it is not lawful to muster into service a person under the age of eighteen years. Certain powers of discharge are granted to the Secretary of War, which he is required to exercise in the cases specified. The sum of these provisions for discharge is as follows: 1. A minor, who is under the age of eighteen years at the time he applies for his discharge to the Secretary of War, is to be discharged by that officer, when it appears, upon due proof, that such minor is in the service without the consent, either expressed or implied, of his parent or guardian, provided all bounties and advance pay which may have been paid to him are first repaid. 2. A person who was under the age of sixteen years when he was enlisted or mustered into service, is to be discharged by the Secretary of War, whether he was enlisted or mustered with or without the consent of his

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parent or guardian, provided all bounties received by him are first repaid, and provided he is under the age of eighteen years at the time he applies for his discharge, and is in the service without the consent, either expressed or implied, of his parent or guardian. The whole power of discharge is given to the Secretary of War in regard to minors, whatever their ages when they enlisted or when they apply for discharge; and, although it is not lawful to muster into service a person under the age of eighteen years, yet Congress has, by the Acts of 1864, confided wholly to the Secretary of War the power and duty of discharging from service a person who was under the age of eighteen years when he was mustered into service, and of ascertaining and deciding, (1) Whether the person is a minor under the age of eighteen years at the time he applies for his discharge; (2) Whether, if he is such minor, he is in the service without the consent, either expressed or implied, of his parent or guardian; (3) Whether such person was under the age of sixteen years when he was enlisted or mustered into service; (4) Whether all bounties and advance pay paid to such person have been repaid. The entire cognizance of these matters is given by law to the Secretary of War, and is necessarily taken from the courts. The courts cannot administer the restitution of the bounties and pay, and it is manifestly the intention of Congress, that the Secretary of War shall be exclusively charged with the question of discharging minors who are under the age of eighteen years when they apply for their discharge. As to the cases provided for by the Acts of 1864, and so far as the jurisdiction of the Secretary of War extends under those Acts, the provision of the second section of the Act of February 13th, 1862, that the oath of enlistment taken by the recruit shall be conclusive as to his age, is necessarily suspended, and the Secretary is authorized and required to receive other due proof as to the age of



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the recruit, both at the time of his enlistment and at the time he applies for his discharge.

The conclusions I have arrived at, as above expressed, are not only reached upon principle, but they are sustained by authority. In the cases of Conley and Jump, before Judge Betts, in this Court, January, 1867, it was decided, that the two Acts of 1864 transferred wholly from the cognizance of the Judiciary to the Department of War the exclusive charge of the *status* of minor recruits in the army. A like decision was made by the same Judge in the case of Thomas Conroy, April, 1867. In the case of George Reilly, before Judge Daly, a jurist of great experience and sound and discriminating judgment, it was held, (March, 1867,) that the result of the legislation of Congress is, that minors over the age of eighteen years may be enlisted without the consent of their parents or guardians. In the case of John O'Connor, before the General Term of the Supreme Court of New York, for the First District, February, 1867, it was held that, as Congress has, by the Acts of 1864, provided for a mode of discharge by the Secretary of War, and prescribed the terms and conditions on which a discharge can be granted, such provision may be construed as forbidding other modes of obtaining a discharge in a case of improper enlistment.

There is one view to be deduced from the language of the Acts of 1864, which has not yet been alluded to, and which has great force in regard to the present case. It is, that Congress clearly evinces, by those Acts, its understanding, that the enlistment of a minor over the age of eighteen years is valid, and that the consent of his parent or guardian is not necessary to the validity of the enlistment. Congress does not make by those Acts any provision for the discharge of a minor who was over the age of eighteen years when he enlisted, or who was under that age when he enlisted, but is over it when he applies for his discharge, but provides solely for the discharge of

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a minor who is under that age when he applies for his discharge. The remedy is applied to the mischief. There is no unlawfulness in the enlistment of a minor over the age of eighteen years, even though his parent or guardian does not consent. But a minor under the age of eighteen years must not enlist, and, if he applies to the Secretary of War for his discharge before he arrives at the age of eighteen years, and shows that he is in the service without the consent of his parent or guardian, he is to be discharged, on first repaying his bounties and advance pay. The minor, in the present case, was nineteen years of age when he enlisted, as appears by his own oath taken on his enlistment. His enlistment was, therefore, valid, and did not require the consent of his father to make it valid, and he must be remanded to service under his proper officer.

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SEPTEMBER, 1867.

IN THE MATTER OF FREEMAN, ORNE, A  
BANKRUPT.

DUTY OF REGISTER.—AMENDMENT OF SCHEDULES.—ABBREVIATIONS.  
—NOTES AND JUDGMENTS.

Registers in bankruptcy are charged with the general supervision and care of cases referred to them.

If, at any stage of proceedings before him, a register determines that a bankrupt's schedules are insufficient, he may of his own motion order them to be amended.

Where the register makes an order that a bankrupt's schedule be amended, the order ought to specify particularly the respects in which it is to be amended.

It is necessary for a bankrupt to state in his schedules, whether or not any note has been given, or any judgment rendered, for every debt, and whether or not any person is liable with the debtor, as a partner or joint contractor.

What is a sufficient statement of those facts is a matter of discretion with the register.

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The use of dots or contractions, in the schedules, to indicate a repetition of words previously used, is forbidden by rule 14 of the General Orders in Bankruptcy.

BLATCHFORD, J. In this case, the petition of the debtor, with schedules attached, was filed on the 27th of June. On the 29th of June, the register certified the papers to be correct, and adjudged the petitioner a bankrupt, and a warrant was issued to the marshal, returnable August 7th. On that day a meeting of creditors was held, which was adjourned from time to time, until the 4th of September, when an assignee was appointed. In schedule A to the petition, there was no averment whether the bankrupt contracted the debts set forth individually, or as copartner. In many cases, it was stated in such schedule that judgment had been obtained, by merely inserting the word "judgment" in the last column of schedule A, No. 3; and in many cases in that form there was no statement affirmatively or negatively, as to judgments or notes. In the same form there was used, in many cases, the contraction "do. do.," or the reference "“ “ “ “", as applied to language and words used before and above such marks.

When the proofs of debt came to be made and filed, it was found that in two cases (both on the debtor's schedules A) the proof was against the bankrupt jointly with other persons, his partners. This was the first knowledge the register had of any partnership of the bankrupt.

In view of this fact of partnership, and the contractions and references referred to above, the register made an order, on the 7th of September, as follows: "It appearing in the course of proceeding, in this entitled matter, that the schedules heretofore filed by the petitioner, and upon which an adjudication of bankruptcy was made, are incorrect and deficient, and do not meet the requirements of the law, it is ordered that the said Freeman Orne make and file a properly verified statement of his unsecured debts, which shall be as an amendment to sched-

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ule A, No. 3, heretofore filed, which amendment to the said schedule shall set forth fully the various facts rendered necessary by the requirements of the law, as shown in the notes of instruction and headings ordered for use in said schedule A, No. 3, by the rules of the Supreme Court, and that such amendments shall be made and filed, on or before the 14th day of September, A. D. 1867."

On the 14th of September, the bankrupt appeared and objected to the order, as one which the register had no power to make, and prayed that five several points, as an appeal from the action of the register, might be certified to the judge for his decision.

1. Whether the register, after an adjudication of bankruptcy, and accepting the surrender of the bankrupt, and issuing a warrant, and the holding of the first meeting of creditors, and the choice or appointment of an assignee, can, of his own motion, and not upon the motion of the assignee, or of some creditor who has proved his claim, order an amendment of the bankrupt's schedule of creditors, theretofore filed by him, to be made by the bankrupt.

In regard to this question, the register states, that he is clearly of the opinion that the register can, of his own motion, order such amendments; that rule 5, of the Supreme Court, specifies "ordering amendments," as one of the acts the registers may perform, under the orders of the court referring cases to them, and that he ought to do so from the fact that otherwise (the certificate of correctness by the register being considered conclusive) oversights could not be corrected, nor could a condition of facts arising in the course of proceedings, be taken notice of, as in this case.

The register is correct in this view. By section thirty-two of the act, the court is forbidden to grant a discharge to the bankrupt, unless it appears to the court that he has, in all things, conformed to his duty under the Act; and the

form of discharge prescribed by that section contains a recital that the bankrupt "appears to have conformed to all the requirements of law in that behalf." Where a case has been conducted before a register, as all cases are required to be by the Act, it is impossible for the court to determine whether the bankrupt has conformed to all the requirements of the Act, unless the register first makes an examination as to that question, and certifies the result to the court. It is a necessary incident of the provision of the Act, that the bankrupt must conform to all its requirements before he can have a discharge, that the court, and the register, acting as the court, when a case is referred to him, should have the power at all times to require the bankrupt to conform to the requirements of the Act. An error, whenever discovered, must be corrected, no matter what proceedings have theretofore taken place. The 33d rule of the "General Orders in Bankruptcy" shows, that when a debtor "omits to state in the schedules annexed to his petition any of the facts required to be stated, concerning his debts or his property," the court, or the register acting as the court, is "to determine whether to admit the schedules as sufficient, or to require the debtor to make further efforts to complete the same, according to the requirements of the law." This determination may be made by the register, of his own motion, and at any stage of the proceedings, and, if he determines that the schedules are insufficient, he may order them to be amended.

2. Whether it is necessary and requisite to a compliance with the requirements of the law, as shown in the notes of instruction and headings to schedule A, No. 3, when no note has been given by the bankrupt, or no judgment has been obtained against him, for or on account of the debt stated, in addition to stating what is the consideration of the debt, to state that no note has been given, or no judgment has been rendered by or against the bankrupt; and, also, in case the bankrupt be solely

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liable for the debt, whether it is necessary to state thereunder that no person is liable with him as copartner or joint contractor.

In regard to this question, the register states, that he thinks the Supreme Court intended, by the headings and notes of instruction referred to, that the fact of the existence of a judgment or a note, &c., should be affirmed or negatived, and not be left to implication or suggestion.

I think that it is necessary to state, in the schedules, whether or not any note has been given, or any judgment has been rendered, and, also, whether or not any person is liable with the debtor, as copartner or joint contractor. What shall be considered a sufficient form of statement in those respects, is necessarily a matter allowing of some latitude of discretion on the part of the register.

3. Whether the said order (if the register, under the circumstances, has power to make it) should not specify, particularly, the respects in which the schedules are, in the opinion of the register, defective, and in which the schedules should, in the judgment of the register, be amended.

In regard to this question, the register says, that he considers an order that the schedules conform to the notes of instruction and headings of the blanks and forms, sufficiently specific to guide the attorney or bankrupt in making amendments, assuming ordinary care and intelligence on the part of practitioners.

I think that the order ought to specify, particularly, the respects in which the schedules are, in the opinion of the register, defective, and in which they should, in his judgment, be amended.

4. Whether, under rule 14 of the Supreme Court, which requires that "all petitions, and the schedules filed therewith, shall be printed or written out plainly, and without abbreviation or interlineation, except where such abbreviation or interlineation may be for the purpose of reference," it is permissible to refer to an above written word or statement, as follows :

## In the Matter of Freeman Orne, a Bankrupt.

" NAME.	RESIDENCE.
A. B.	New York City.
C. D.	" " " "

using the customary marks " " to refer to the above written words.

In regard to this question the register states that he thinks the rule precludes the use of dots to indicate anything necessary to be stated. I concur with the register.

5. It is supposed that one of the defects and errors in the schedule referred to in the order, as appearing in the course of proceedings in the matter of Orne, is the omission in stating the debt scheduled as William H. Earle's, to state that the bankrupt was jointly liable with any other person. It appeared, by the proof of debt offered by the said creditor, that the debt exists as a judgment against two other persons jointly with the bankrupt, and another defect or omission appeared by the fact that, at the first meeting, a creditor whose name was not on the schedule filed by the bankrupt, appeared and made proof of a claim against the estate of the bankrupt; and the question is submitted whether, upon the facts, the bankrupt can be ordered, upon the motion of the register, after the adjournment of the first meeting of creditors, to amend the schedules annexed to his petition, to conform to the facts.

In regard to this question, the register says that the facts are not fully stated; that the proof of debt, in the case of Earle, averred that the persons against whom, jointly with the bankrupt, the judgment was obtained, were copartners with the bankrupt; and that, in the opinion of the register, he should have full power to order, on his own motion, necessary amendments, to make the schedules show all facts connected with debts, or else he should have no power so to do.

I am of the opinion that the bankrupt can be ordered, on the motion of the register, after the adjournment of the first meeting of creditors, to amend the schedules annexed to his petition, to conform to the facts.

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The register states, in his certificate, that he is of the opinion that the registers are charged with the general supervision and care of cases referred to them, without regard to the fact whether creditors or assignees or bankrupts move for amendments, or any other action. I concur with the register in this view.

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SEPTEMBER, 1867.

IN THE MATTER OF JOHN BELLAMY, A  
BANKRUPT.

ORDER TO SHOW CAUSE WHY BANKRUPT SHOULD NOT BE DISCHARGED.—

REGISTER'S CERTIFICATE OF REGULARITY.—REGISTER'S FEES.—  
FILING PAPERS.

On a petition, according to form No. 51, by a bankrupt for his discharge, the register to whom the case is referred may direct the making of the order to show cause contained in that form.

What is to be contained in that order, and the practice under it.

Whether there be opposition to the bankrupt's discharge or not, the register must furnish to the court, after the return day of the order to show cause, a certificate that he has examined carefully all the proceedings in the case, and that the bankrupt has in all things conformed to the requirements of the Act.

The bankrupt is made responsible for the regularity of the proceedings, and is bound to see that all the necessary steps are regularly taken, or he cannot have his discharge.

The register is entitled to fees for the above services, under section forty-seven of the Act, as for services "while actually employed under a special order of the court."

No discharge can be granted until all the papers relating to the case are filed by the register in the clerk's office.

In this case application was made to the register, upon a petition in due form, for an order to show cause why the bankrupt should not be discharged from his debts. The register stated to the court, that he was in



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In the Matter of John Bellamy, a Bankrupt.

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doubt as to the form of the order, that is, as to whether it should be made returnable before the register, and, if not, on what day and hour it should be made returnable before the court; that there was no prospect of any opposition to the discharge, and that the bankrupt insisted that the order should be made returnable before the register, that it should give notice of the second and third meetings of the creditors, pursuant to rule 25 of the "General Orders in Bankruptcy," that, in case no one appeared to oppose on the return day or before, the bankrupt might on that day make and subscribe before the register to the oath required by the twenty-ninth section of the Act, that, thereupon, it would be the duty of the register, pursuant to the provisions of rule 7 of the "General Orders in Bankruptcy" to file all papers in the case with the clerk, and certify, by the usual daily certificate, the proceedings of such last day before him, and that the court would thereupon, nothing appearing in the record to the contrary, sign the bankrupt's final discharge. The register also stated, that it would seem scarcely worth while, when a case really goes, as it were, by default, when the discharge must inevitably follow upon the proceedings theretofore had, that the court should be troubled to fix a day to do nothing; that, in case there is opposition, and the creditor opposing files the specifications provided for by section thirty-one of the Act, the register would then (if there were no assets) in like manner return all the papers into court, as directed by said rule 7, with the usual certificate, from which certificate and papers, composing the record, the court would order a trial, as it might see fit, pursuant to section thirty-one; that the case would then seem to be closed before the register unless sent back for some purpose; that certainly, there being no assets, there would be nothing more a register could do; and that, if a trial were ordered by the court, and the bankrupt were to be successful, the court would sign his discharge, and, if unsuccessful, the discharge would be denied.

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BLATCHFORD, J. I have heretofore held that, upon a petition, according to form No. 51, by a bankrupt for his discharge, the register to whom the case is referred may direct the making of the order to show cause contained in form No. 51. This order may be made returnable before the court at the office of the register, to be sufficiently designated, on such day and hour as the register appoints, allowing time for the proper publication of notice. The order must name the newspapers in which the notice is to be published. The selection of the newspapers is to be made by the register, with due regard to the requirements of section twenty-nine in reference to such selection, and is to be made from among the newspapers named in rule 21 of the rules of this court in bankruptcy. The publication will be made for three times once a week, in two newspapers, with an interval of seven days between every two publications, and an interval of seven days between the last of the three publications and the return day of the order. The notice, form No. 52, both as published and as served, must specify, as the place of hearing, the office of the register, to be sufficiently designated. If the notices to be served be sent by mail, they must be mailed by the clerk. A fee to the clerk for this service is prescribed by rule 30 of the "General Orders in Bankruptcy," and, by the memorandum appended to form No. 52, the certificate of the clerk as to the mailing of the notices and the placing thereon of the proper postage stamps is made evidence of the fact of notice. The proof of publication in the newspapers may, as in other cases, be by the usual affidavit of the printer.

In a case where no debts have been proved against the bankrupt, or no assets have come to the hands of his assignee, if the second and third meetings of creditors required by the twenty-seventh and twenty-eighth sections of the Act have not yet been held, the order to show cause in form No. 51 should contain the direction

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In the Matter of John Bellamy, a Bankrupt.

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provided for by rule 25 of the "General Orders in Bankruptcy," in regard to such second and third meetings, and the notice, form No. 52, published and served in pursuance of the order, should have added to it the clause provided for by said rule 25, in regard to such second and third meetings.

This power of the register to act on the return of the order to show cause on the petition of the bankrupt for his discharge, is deducible from the provision of section four of the act, that the register shall have power, and it shall be his duty, "to pass the last examination of any bankrupt in cases whenever the assignee or a creditor do not oppose." Form No. 53 contemplates that, if a creditor opposes a discharge, he may address to the register the specification in writing of the grounds of opposition required by section thirty-one of the Act. If, under rule 24 of the "General Orders in Bankruptcy," no creditor enters an appearance in opposition to the application for a discharge, by the day when the creditors are required to show cause, the register may require the bankrupt to take and subscribe the oath provided for by section twenty-nine. Whether there be or be not opposition to the discharge, the register must furnish to the court, after the return day of the order to show cause, and before the court will either grant a discharge or try any question raised as to the discharge, a certificate to be made by the register, that he has examined carefully all the proceedings in the case, and that it appears to him, from those proceedings, that the bankrupt has in all things conformed to his duty under the Act, and has conformed to all the requirements of the Act. The provisions of section thirty-two of the Act as to the prerequisites to a discharge mean, that all the requirements of the Act as to what steps are to be taken, from the commencement of the proceedings to the end, must be conformed to, as prerequisites to the granting of a discharge, and not merely that the bankrupt has personally

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In the Matter of John Bellamy, a Bankrupt.

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done what he is required to do. Claiming, as the bankrupt does, the benefit of the Act, he is made responsible for the regularity of the proceedings, and he is bound to see, as the case proceeds, that all the necessary steps are taken, and regularly taken, or else he cannot have his discharge. The register will, therefore, with a view to making the certificate in question, examine carefully all the steps in the case, and, if he finds any want of conformity to the requirements of the Act, he will specify what it is, so that the defect may be supplied, if it can be. As this is a service involving care and responsibility, the clerk will, in every case where a petition for discharge is filed hereafter, enter a special order referring it to the register in charge of the case, to make an order to show cause thereon, and to sit in chambers on the return thereof, and pass the last examination of the bankrupt, if there be no opposition, and certify to the court whether the bankrupt has in all things conformed to his duty under the Act, and has conformed to all the requirements of the Act. In rendering these services, the register will be considered as acting under the special order, so as to entitle him to be compensated for such services under that clause in section forty-seven of the Act which gives to the register, "for every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court."

The regulations announced in this decision will be considered as standing rules of this court in cases in which petitions for discharge shall be hereafter filed.

It must also be understood, that no discharge will be granted until, under rule 7 of the "General Orders in Bankruptcy," all the papers relating to the case are filed by the register in the office of the clerk of the District Court.

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The Schooner Onrust.

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SEPTEMBER, 1867.

IN THE MATTER OF ELIZA ALTENHEIM, A  
BANKRUPT.

## APPEARANCE.—PROTEST.

A person named as a creditor in a bankrupt's schedule, but who does not appear in person or by attorney duly constituted, and has not proved any debt, cannot put on file a protest against being named as a creditor.

In this case, at the first meeting of creditors, an attorney appeared on behalf of a party named in the bankrupt's schedule as a creditor by virtue of a mortgage on certain real estate of the bankrupt, executed by a former owner thereof, and asked leave to put on file a protest on his part against being named as a creditor. The bankrupt objected, and the register held that, as the party did not appear in person or by attorney duly constituted, and had not proved any debt, the paper could not be filed. The question was certified to the Judge, who sustained the decision of the register.

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OCTOBER, 1867.

## THE SCHOONER ONRUST.

CHARTER PARTY.—CONTRACT TO GO DIRECT.—SEIZURE BY MILITARY  
OFFICER.—VIS MAJOR.

Where a vessel was chartered in New York to bring a load of cedar from Bayport, Florida, to New York, the charter containing the clause "It is understood that the vessel is now loading for Key West or Tortugas, and is to proceed thence direct to load under this charter," and on her delivery of her outward cargo at the Tortugas, she was seized by the officer in command of Fort Jefferson

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on the ground that her services were necessary to bring from Key West a supply of coal, for the steam engine by which the Fort was supplied with water, and was compelled to perform two voyages to Key West for coal with a file of soldiers on board, and then being released after a detention of fifty days, went at once to Bayport, where she was loaded by the charterer's agent under a protest that loading the vessel should be no waiver of the charterer's right "to damages by reason of the failure of the schooner to go direct from the Tortugas to Bayport;" and, cedar having fallen in price in the New York market between the time when she would ordinarily have arrived in New York, had there been no detention, and the time of her actual arrival, the charterer libelled the vessel to recover the difference in price caused by such fall in the market, as his damages;

*Held*, That under that clause in the charter, the owners of the vessel had not agreed to be at the Tortugas or at Bayport at any specified time, and that time therefore was not a specific and essential element in the contract.

That the meaning of the contract was that the vessel was to proceed without unreasonable delay and by the usual route; and that the contract would have been the same if the word "direct" had been left out.

That under this charter the master of the vessel was bound to the highest degree of diligence in going from Tortugas to Bayport.

That he was not responsible for delays in that voyage caused by irresistible force.

That on the facts in this case the master was entirely faithful and diligent, and the vessel was not responsible for any damages occasioned by the enforced delay.

On the 14th of December, 1865, Eberhard Faber chartered the schooner Onrust in New York to bring a load of cedar timber from Bayport, Florida, or some one of several other specified ports adjacent thereto, to New York. At the time the charter-party was signed by the parties, the schooner was in New York, and one clause in the instrument read: "Also, it is understood that the vessel is now loading for Key West or Tortugas, and is to proceed thence direct to load on this charter."

In due time, the Onrust left New York and reached Fort Jefferson at the Tortugas, and on the 19th of January, 1866, had discharged her outward cargo of military stores for the Fort, and was ready to proceed to Bayport for the purpose of loading under this charter, when she was forcibly seized, by order of the United States military officer, commanding at Fort Jefferson, and sent to Key West for a cargo of coal, on the alleged ground that it

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was necessary, in order to work the condenser upon which the post mainly relied for drinking water. To secure the enforcement of the order, a sergeant and a file of men were placed on board, and proceeded with the vessel to Key West. She performed the voyage, and brought three hundred tons of coal to the Fort, which she discharged on or before the 9th of February, and was again ready to sail for Bayport, when she was again ordered to Key West by the same officer, or by his subordinate, and proceeded under duress to Key West, for another cargo of coal, which she delivered at the Fort, whereupon she was released, and on the 11th of March sailed for Bayport.

The captain of the Onrust, in both instances, protested against the seizure and enforced services of his vessel and crew.

After her arrival at Bayport, she was loaded by the agent of the libellant, under protest that there should be no waiver of the right of the charterer to damages, "by reason of the failure of the schooner to proceed direct from Tortugas to Bayport."

The schooner did not arrive in New York till the 24th of April. Between the 15th of March and the 24th of April, cedar timber fell in the New York market. But for the forcible detention by the military officers at Tortugas, she would, in the ordinary course of navigation, have arrived with her cargo at New York before the fall in the market. Faber thereupon brought this suit *in rem* for a breach of the charter-party, on the ground that the schooner did not proceed direct from the Tortugas on discharging her outward cargo, but deviated and delayed fifty-one days, and he sought to recover damages in proportion to the decline in the price of cedar timber in the New York market, between the time she would have delivered the cargo there, had there been no delay, and the time she actually delivered it.

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*G. DeForest Lord*, for the libellant, argued as follows :

1. The delay at Fort Jefferson was an admitted violation of the terms of the charter, "to proceed direct," &c. It is confessed on all sides that an interruption of the voyage, such as occurred, was against the intention of the contract. The captain's protest at the Tortugas, the conversations between him and the libellant's agents at Bayport, and all the facts of the case, show it to have been fully admitted that the contract, as understood by both the contracting parties, had been broken in this particular.

Where the word "directly" is used, it imports more than the legal obligation of speed. (*Duncan v. Topham*, 8 C. B. Rep. p. 225.) The language of this charter is therefore wholly inconsistent with an interruption to make two trips to Key West and back.

2. The interruption of the Onrust's voyage, by the action of the U. S. military officers, affords no excuse for the breach of the charter. Their action was unwarranted, and amounted to a trespass, for which they would be personally liable to the owners of the vessel. The following doctrines, applicable to this case, are clearly laid down in the case of *Mitchell v. Harmony* (13 How. Sup. Ct. Rep. 115): (a) That, although, in cases of extreme necessity, military officers may impress private property to the public use, yet it must be under circumstances of *immediate and impending danger, which will not admit of delay, or of a resort to the ordinary methods of relief*. (b) That the circumstances alleged to create such necessity, must be *proved* to the court by competent evidence. (c) That even where such necessity is shown to exist, although the officer would no longer be regarded as a trespasser, yet the government would still be bound to make full compensation at all events.

As to the applicability of that case, it is suggested that the rule which was applied so stringently to acts done in time of active pressing war, will certainly not be



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relaxed in its application to acts done in a period of actual and perfect peace, when there was not an armed enemy throughout the land. If a seizure would not be justified, for the purpose of carrying out an important military enterprise (which Col. Mitchell's expedition was admitted to have been) very clear proof of a very pressing necessity would be required to sanction an act, which could have been easily *avoided* by a little foresight on the part of the very officers who made the seizure in this case. No necessity, however great, will excuse a seizure, where there is time and opportunity to meet the emergency by a resort to ordinary means for accomplishing the object. On the facts shown in this case, no such necessity is proved to exist, and the action of the officers was unauthorized.

But even if their action had been authorized, so as to relieve them from the character of trespassers, the government is still bound to make full amends, and the *owners of the vessel* are the persons, and the only ones, who should, or could obtain, such indemnity. "Private property shall not be taken for public use, without just compensation" (*Art. 5 of Amendments to the Constitution*). "Just compensation" would certainly include all damages for which the owners would be responsible, by reason of this breach of charter. The owners alone could make a claim upon the government. The charterer's only remedy would be upon the contract. (*Gosling v. Higgins*, 1 *Camp*. 451.) The owners might justly claim that the damages caused by the breach of this charter, were the legitimate consequences of the interruption of the voyage. But the charterer could not pretend that there had been any trespass committed upon him. There had been no direct contract between him and the United States authorities, and his only claim would be through the contract with the owners.

3. Assuming that the seizure was unauthorized, and in law a trespass, the owners of the vessel are responsible

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for damages under their contract. This is an express contract to "go direct," and the rule of law in such cases is laid down as follows: "It is a well settled rule that when the *law creates a duty* and the party is disabled from performing it, without any default in himself, *and has no remedy over*, there the law will excuse him. But where the party, *by his own contract*, creates a duty or charge upon himself, he is bound to make it good, *notwithstanding any accident or delay* by inevitable necessity, because he might have provided against it by his contract" (*Harmony v. Bingham*, 12 N. Y. 107, *Addison on Contracts*, p. 424, 1130).

The authority of this rule rests on innumerable decisions, and is too well settled to be shaken. The dictum of Lord Heath, in *Beall v. Thompson* (3 Bos. & Pull. 427), that the rule did not apply to maritime contracts, because in them the perils of the sea were always excepted (even if it were received as authority), would not create an exception broad enough to cover this case, for the breach here was not caused by a peril of the sea.

Neither does the dictum of Judge Woodruff, in *Conger v. The Hudson R. R. Co.* (6 Duer, 375), that "the carriers' duty, to deliver within a reasonable time, is only relative, and they are not responsible for delays occurring without their fault," reach this case, because (a) That dictum only applies to *carriers*, and the breach in this case occurred before the owners assumed the character of carriers, which they could not assume till the cargo was placed on board. (b) Judge Woodruff had in view the duty which the *law* imposes on carriers, and not the responsibility which parties *assume for themselves*. He was, also, doubtless influenced by the consideration that the risk of collision was one of those ordinary contingencies to which all such contracts are liable, and which might fairly be assumed to have been in the mind of the parties. (c) The breach in the case of the *Onrust* was not a mere *delay* in the performance of the contract, but

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a *failure to perform* it, for the contract was to "go direct," and that was broken.

The only exceptions to the obligation of the rule above cited, arise when the thing to be done becomes physically impossible, or positively unlawful. Thus, the death of a party, for whose appearance a recognizance has been given, is held an excuse (*The People v. Manning*, 8 Cow. 297). So, also, the death of an animal that has been replevied. (*Carpenter v. Stevens*, 12 Wend. 589.) And all the cases in which embargoes have been held to suspend the performance of a contract, may be classed under the second of the above exceptions—the obligation of embargoes being recognized by the law of nations. But the act of the U. S. authorities in this case, had no legal sanction whatever, and in that respect differed from an embargo.

The act of God, or the interposition even of Governmental action, proceeding from a source whose authority is not recognized, is not an excuse in such cases.

*Shubrick v. Salmon*, 3 Burr. 1637; *Sjoerds v. Luscombe*, 16 East. 200; *Bligh v. Page*, 3 Bos. & Pull. 295; *Gosling v. Higgins*, 1 Camp. 451; *Evans v. Hutton*, 6 Jur. 1042.

The unauthorized act of an officer of our own government would be no better excuse for non-performance, than the above cases of the legitimate acts of unrecognized governments.

4. From these considerations, it seems clear that the rule first laid down applies to this case, and the breach being unexcused by the facts, the owners are responsible for the damages sustained by the charterer. \*

*R. D. Benedict*, for the claimants, presented the following points :

1. Assuming that Fort Jefferson was dependent upon coal to supply it with water, and that the ordinary means

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\* The arguments on both sides on the question of damages are omitted, as the case was decided without reaching that question. R. D. B.

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of procuring coal had proved insufficient, so that on two occasions they had been entirely out of it, the first question for the court is, "Was not the officer in command justified in taking the Onrust to secure a sufficient supply? Or was his act a wrongful one, which made him personally liable in damages?"

The libellant relies upon the case of *Mitchell v. Harmony* (13 How., p. 115). But the facts of that case were entirely different from those of the case at bar. There was no question in that case of what was necessary for the support or protection of the army, which is the question here. There is no question here of "insuring the success of an enterprise against a public enemy" yet to be undertaken, which was the only question there. (*Id.*, p. 155.) The court in that case held, that assuming the necessity of taking the property *for the object in view*, viz., "the enterprize undertaken against the enemy," that was not such a necessity as would protect the officer. But it cannot be urged, that with the object in view in this case, viz., the protecting the army from thirst, the necessity of taking property would not be such an one as would protect the officer. It is clear, that in this case there was a "necessity urgent for the public service, such as would not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for." (*Id.*, p. 134.)

2. If the seizure was authorized, the authorized act of an officer of the Government is the act of the Government, and such an act is a protection to the vessel.

a. There can be no difference in principle between a seizure of all vessels and a seizure of one. The first is generally spoken of as an embargo, but the word embraces the latter also. "An embargo is commonly understood to be a prohibition of ships sailing, on the breaking out of a war, to hinder their giving any advice to the enemy. But it has a much more extensive signification, as they are not only stopped from the afore-

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mentioned motives, but are frequently *detained to serve a Prince in an expedition*. \* \* \* \* *It is certainly conformable to the law, both of nature and of nations, for a Prince in distress to make use of whatever vessels he finds in his ports, that are fit for his purpose.*" (*Beaunes Lex Mercatoria*, p. 260. See also *Roccus N. 10 & 65.*)

Now the embargo suspends the performance of contract, leaving the rights of parties untouched. (*Bow. Law Dict., Word Embargo; Hadley v. Clark*, 8 Term Rep., 259.) The reason of this is well stated in *Powell on Contracts*, p. 267. "In all cases of contracts and agreements, the parties must be supposed not to have consented, but under a tacit condition that they shall be discharged, if the State throw any obstacle in their way."

b. A Restraint of Princes has always been held to be a "*casus fortuitus*," for which the party restrained is not liable. "*Regis et principis facta, inter casus fortuitus enumerantur.*" (*Roccus Ins. N. 65.*) So says the Consulat de la Mer, which provides, that where a ship cannot be loaded as agreed, by reason of restraints of Princes, the charterers are not called on to pay any freight, "for it is not their fault if a restraint of Princes has arisen, since, against a hindrance by God and by the Prince, no one can say anything or make opposition." (*Consulat de la Mer, by Boucher, vol. 2, § 472.*)

Says Valin, speaking of a decision of the Royal Court of Rennes that a temporary restraint only suspends a charter, "This decision is applicable as well to the case where a ship is arrested in a port where it touches during the voyage, as to the case of her being restrained before sailing, inasmuch as there is no reason for a different rule as to the fate of the charter. In either case, the master and the freighter must wait for the opening of the port and the liberty of the vessel, without any claim for damages on either part." (*Valin, tit. 8. Approved by Boulay Paty, vol 2, p. 292.*)

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So, also, *Boulay Paty*, vol. 2, p. 37, "Every event, every loss, every damage received by goods, which the captain could not foresee, and which it was impossible for him to resist, cannot be considered as occasioned by his fault. *Therefore he is not responsible for them.*"

c. The reason of this exemption is the same as the reason of the exemption of "perils of the sea." It is, that "*vis major*" suspends the performance of the contract, by making it an impossibility. "*Vis major*" is that which cannot be resisted. "*Cui resisti non potest.*" (*Emerigon L. 15, § 2.*) The same rule applies to loss by pirates. (*Pickering v. Barclay*, 2 Roll. Abr., 248.) The same reason lies at the bottom of the exemption arising from the acts of public enemies. Shall the court hold that the enemies of the ruler have more power than the ruler himself, so that while a seizure effected by a public enemy of the ruler would be a defence to an action, for breach of a contract caused by the seizure, the same seizure, effected by the ruler himself, is no defence?

Now the exception of the "perils of the sea" is implied, even though not specified in the contract. (*Williams v. Grant*, 1 Conn., p. 487; *Crosby v. Fitch*, 12 Id., p. 410.) The reason of this is, because of the "*vis major*," and the same rule should hold of "restraints of Princes" for "*eadem ratio, idem jus.*"

3. But it is said that the vessel is not protected, because the exception was not made in the charter, as it might have been.

All the cases which bear upon this principle start from the case of *Paradine v. Jayne* (*Aleyn*, 26), where the language is "Where the party, by his own contract, creates a duty or a charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by unavoidable necessity, because he might have provided against it by his contract."

Now, there is a distinction to be always kept in mind, in discussing this principle, between maritime contracts

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and others. The sea is not to be judged by the same rule as the land. It is a different element. It has a law—it has usages and customs of its own ; and a rule, in force as to contracts on land, may have no force as to contracts on the sea. Says Judge Heath, in *Beale v. Thompson* (3 *Bos. and Pul.*, p. 427), in reference to this very rule : “The maxim, cited out of Aleyn, does not apply to marine contracts.” That was an action upon shipping articles, in which, if the rule in Aleyn had been applied, the plaintiffs must have recovered. But the court gave judgment for the defendant.

Now a charter, like shipping articles, is a contract peculiar to the sea, and the law of covenants and deeds is not to be too closely applied to it. A bill of lading is a similar contract, as to which, under the cases above cited, the exception of “perils of the sea” applies, though not specified. If the acts of the King’s enemies excuse non-performance of a marine contract, though not specified in it, as held in *Beale v. Thompson*, and the perils of the sea, though not specified, also excuse its non-performance, as held in *Williams v. Grant* and *Crosby v. Fitch*, why shall not the “restraints of Princes” be equally an excuse, although not specified in the contract ? All the old authorities which we have quoted (*The Consulat de la Mer*, *Valin*, and *Boulay Paty*), agree that the excuse is valid, and there is no necessary conflict between them and the maxim in Aleyn, for they all are speaking of marine contracts.

4. But these words of *Paradine v. Jayne* have been, as I think, misconstrued by the subsequent decisions. The facts of the case have not been adverted to ; the illustration used by the court has not been considered, and the words “if he may” have been left out of view entirely.

a. The facts of that case were, that as against an express covenant to pay rent, the defendant set up that by force of armies he had been *deprived of the profits of*

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*the land*—not that he had been prevented from paying. If he had pleaded that, by reason of the force of armies, the payment could not be made, although he was always willing to pay, would not that have been a defence?

b. The illustration is, "If a lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it." But it is by no means the same thing to say that enemies caused the injury which he agreed to repair, and to say that enemies prevented him from repairing. If the lessee should plead that he was always ready and willing to repair, but enemies prevented, is there anything in the case of *Paradine v. Jayne*, which would hold it to be bad pleading?

c. Why did the court say, "He is bound to make it good, *if he may*?" The argument here is, that he is bound to make the agreement good, *whether he may or not*. Apply the language of the decision to the case at bar, and it would be, "The owners of the Onrust having, by the charter, created this duty or charge upon themselves (to go direct), they are bound to make it good, *if they may*." But the question in the case is, whether they might or not.

5. The insertion of the word "direct" in the charter, adds nothing to the liability of the vessel. The word "directly" in the case of *Duncan v. Topham*, cited by the libellant, is used in a different sense from this. The Onrust was bound to go "direct," just as much, whether that was in the charter or not. (*Flanders Mar. Law*, § 208.) The duty to go direct was thrown upon her by the law, not assumed by her own contract. Now, it cannot be held, that where a party merely *expresses in words the contract which the law throws upon him*, he is thereby prevented from availing himself of the exceptions which the law gives him. The rule in *Paradine v. Jayne* does not go so far as that, nor does the case of *Harmony v. Bingham*, cited by the libellant. In that case there was an agreement by a carrier to carry freight from New



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York to St. Louis *in so many days*, and this limitation of time only is what the court refer to. But suppose the defendant in that case had simply agreed in writing to "carry and deliver." That would have been expressly contracting to do a duty which the law threw upon him. Would it be pretended that he could not set up delays by inevitable accident? Nothing in the decision indicates that the court would press the doctrine so far.

Besides, that suit was brought to recover \$50,000 damages, but the recovery was only \$1,158, which plaintiff recovered simply on the ground that by the contract the defendants had agreed to make deductions from the freight at a certain rate, if the goods were not delivered in so many days. The deductions amounted to a greater sum than the freight, which the plaintiff had been compelled to pay to get his goods. But the referee (Judge Bosworth) held that, "as the failure to deliver occurred from causes beyond the control of the defendants, *their only liability is a loss of all right to any freight.*" (1 *Duer*. p. 222.) And that judgment was sustained. That being the law, how can the vessel in this case be liable for damages?

6. But again, the vessel is not liable for mere delay in performance, caused by this seizure, whether it was authorized or unauthorized. Delay in the performance of a contract is different from a failure to perform it, or such a performance as works injury to the property. "Where the goods are actually delivered, and the complaint is only of a *late* delivery, the question is simply one of *reasonable diligence*, and accident or misfortune will excuse the carrier unless he have expressly contracted to deliver the goods within a limited time." (*Weibert v. The Erie R. R. Co.*, 12 *N. Y. Rep.*, p. 251.) This rule is sustained by numerous authorities. (*Parsons on Cont.*, vol. 1, p. 659; *Angell on Carriers*, § 289; *Parsons v. Hardy*, 14 *Wend.*, 217; *Hadley v. Clark*, 8 *T. R.*, p. 259; *Constable v. Cloberic*, *Palmer*, p. 397; *Conger v. The Hudson River R. R. Co.*, 6 *Duer*, p. 375.)

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Now, under the facts in this case, the vessel certainly used reasonable diligence. She could have done nothing more than she did.

SHIPMAN, J. The obvious question in this case is, whether the seizure and enforced deviation and delay by the military force at Tortugas, constitutes a breach of the agreement to proceed direct, for which the owners are liable. As there are no exceptions in the charter party under which the deviation can be sheltered or justified, we must look to the general legal import of the contract, and the responsibilities under which it placed the owners of the vessel. The point on which the case turns lies in this clause of the charter party: "Also, it is understood, that the vessel is now loading for Key West or the Tortugas, and is to proceed thence direct to load on this charter." What were the obligations assumed by the owners under this clause of the contract? Clearly, not to be at Tortugas, or Bayport, within any specified time. Time is, therefore, not a specific and essential element in the contract. Of course, if the owners had agreed that their vessel should be at Bayport on or before a specified day, then a failure to comply would have been a breach, for which they would have been liable. No exceptions of perils of the sea, irresistible force, or inevitable accident were inserted in the charter, and none could have been set up to excuse a failure to be at a given port within a time expressly limited by the contract. It is well settled law that even the act of God will not excuse the performance of an express and positive stipulation of a valid contract. (*School District v. Dauchy*, 25 Conn. Rep., 530.) But the clause of this charter now under consideration is not express as to time. The words, "to proceed thence direct to load on this charter" are not clear and precise when applied to the subject matter—the voyage in question. "Direct" does not mean in a straight line nor instant. The language

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does not measure the exact obligation imposed by the contract. Here the law steps in, and implies that the obligation assumed was to proceed without unreasonable delay and by the usual route. The same legal implication would have sprung from the contract in the absence of the word "direct;" for where the undertaking is to proceed from one port to another, a direct voyage is always *prima facie* intended. The law implies this, and the legal presumption is conclusive, until rebutted by some custom to deviate or proceed by another route. (*Sarony v. Russell*, 3 *Pickering Rep.*, 360.) If the word "direct" had, therefore, been left out of this clause, the law would have raised an implied promise to proceed direct from New York to Key West or Tortugas, and thence direct to Bayport or some one of the other ports named. The time, within which such a promise is to be performed, is regulated by law. As the law implies the promise or obligation, so it implies the rule which must govern its performance. No time having been prescribed by the parties, the legal presumption is that they intended a reasonable time.

The case of *Duncan v. Topham* (8 *C. B.* 65, *Com. Law Rep.*, 225), was cited at bar by the libellant. That case held, that where a contract was to be performed "directly," it meant something more than a reasonable time, and that the word "directly" imported "speedily," or, at least, "as soon as practicable." A glance at that case shows that it was very little like the one now under consideration. The subject matter bore no resemblance to the one we are now considering. The contract itself was the result of a correspondence between the parties, and, when expounded with reference to the subject matter, clearly presented a limitation as to time. But if we apply the doctrine of that case to the one now before us, we shall construe the clause of this charter to be an agreement of the owners of the *Onrust* that she shall proceed from New York to Key West or Tortugas, in a

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reasonable time, and from thence as soon as practicable, or speedily, to load on this charter. Still we have no express stipulation, by which time is made an essential element in the contract. We must resort to the rules of law for the measure of the obligation assumed. From New York to Key West or Tortugas reasonable diligence is required in expediting the voyage by the direct route, and from Tortugas to load on this charter, the highest degree of diligence. It is hardly necessary to cite authorities to show, that where a party is bound to the exercise of even the highest degree of diligence, he is not responsible for delay, caused by the interposition of irresistible force, where that force confronts and overpowers him without any fault of his own. "By irresistible force is meant such an interposition of human agency, as is, from its nature and power, absolutely uncontrollable." (*Story on Bailments*, sec. 25.) For delay caused by such a force, a ship bound to proceed on her voyage with any the highest degree of diligence, is no more responsible than she would be for delay caused by lightning or the gale. The most extraordinary diligence cannot go beyond the most exacting fidelity and care in the performance of duty. When these are exhausted in the execution of a contract, where no time is expressly prescribed, the obligations of the party, upon whom the duty rests, are discharged. In the present case the master of the Onrust was entirely faithful and diligent. He not only refused to charter his vessel to the military officers at Tortugas for the purpose of transporting the coal, but he formally protested against the seizure of his vessel, and submitted only to an overpowering force. For this enforced detention, whether lawful or unlawful, the vessel is no more responsible than she would have been if the same delay had resulted from her being driven out of her course by a storm which she could not resist. It follows, therefore, that, as the contract only bound the owners to prosecute the voyage with diligence, and

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that diligence was exercised, the delay caused by military force constituted no breach.

In view of this conclusion it is hardly necessary to dwell on the cases cited by the libellant, to show that a party may be responsible for the non-performance of a contract, where his failure has been caused by the interposition of illegal force. I will, however, notice one, for the purpose of suggesting in the same connection the distinction which separates that class of cases from the one now before us. *Gosling v. Higgins* (1 *Camp. Rep.*, 451), was an action for the non-delivery of ten pipes of wine, shipped at the Island of Madeira, on board of a vessel of which the defendant was owner, to be carried to Jamaica, and from thence to England. When the vessel arrived off Jamaica, she was seized, with her cargo, for a supposed violation of the revenue laws, and there condemned; but, upon appeal to the Privy Council in England, the sentence of condemnation was reversed. A verdict for the plaintiff was ordered by Lord Ellenborough, who remarked to the defendant's counsel, "You have an action against the officers. The shipper can only look to the owner or master of the ship." Here it will be seen was a breach of an express and essential stipulation in the bill of lading, which was to deliver the wine in England. No delivery was ever made. In other words, there was no performance. But the present controversy does not arise out of the breach of any express stipulation. The voyage was performed and the cargo delivered. The only pretended breach consists in not proceeding from Tortugas to Bayport in proper time. But no particular time was stipulated in the contract, and the only time to which the vessel was bound, was that implied by law from the use of the word "direct," which, under the strictest construction, can only mean that period necessary, in the use of the highest diligence, under all the circumstances, to accomplish the voyage. The distinction is obvious. In one case, there was a

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breach of an express stipulation in the contract. In the other, the time of performance was prolonged by no fault of the master, but, as time was not made the essence of the contract, enforced delay was no breach.

It is obvious that the claim of the libellant would stand upon no higher ground if the word "direct" were held to apply primarily to the route, rather than the time of the voyage from Tortugas to Bayport. The word, applied to either aspect of the case, would be governed by the same rules of law. But, in fact, the gravamen of the libellant's complaint, is not that the Onrust did not pursue the customary route from Tortugas to Bayport, but that she did not start from the former port at the time she ought.

Let a decree be entered dismissing the libel with costs.

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OCTOBER, 1867.

## IN THE MATTER OF CHARLES G. PATTERSON, A BANKRUPT.

### ISSUE OF LAW IN BANKRUPTCY.—WAIVER.—FILING PROOF OF DEBT BEFORE FIRST MEETING.—EXAMINATION OF BANKRUPT.

Where creditors, before the first meeting of creditors, filed proof of their debt, and applied for an order for the examination of the bankrupt, and the bankrupt objected to the granting of the order, on the ground that it could not be made before the first meeting, and, after argument, the register granted the motion, whereupon the bankrupt moved that the question be adjourned into court for the decision of the Judge, under section four of the Bankruptcy Act, and the register declined to adjourn the question, but, on the bankrupt's request, certified the matter to the court;

*Held*, that the objection of the bankrupt to the granting of the order for the ex-

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amination, raised an issue of law which it was the duty of the register to adjourn into court.

That, as the bankrupt argued the question before the register, he waived his right to have the question adjourned into court, and, after the decision of the question by the register, there was no issue of law to be adjourned, and the register was right in not adjourning the question under section four.

That creditors may prove their claims before the first meeting of creditors.

That a creditor who has proved his claim, may apply for an examination of the bankrupt before the first meeting of creditors.

That it is not the duty of the register to notify the bankrupt, or his attorney, of the filing of proof of any claim before the first meeting of creditors.

BLATCHFORD, J. In this case, an adjudication of bankruptcy was made September 12th, 1867, and a warrant was issued to the Marshal, returnable October 23d. On the 23d of September, Tupper & Beattie, creditors on the debtor's schedules, filed a proof of debt. On the 25th of September, Tupper & Beattie made a motion before the register for an order for the examination of the bankrupt, under section twenty-six of the Act, and according to form No. 45. The bankrupt objected to the granting of the order, on the ground that the order could not be made before the first meeting of creditors. After argument, the register granted the motion. Thereupon, the bankrupt moved that the question be adjourned into court for the decision of the Judge, under the provisions of section four of the Act, and tendered his questions and issue to the creditors, in order that they should state their points, and that, issue of law being thus joined, the same might be adjourned into court by the register, for decision by the Judge, as provided for in the fourth section of the Act. To this tender the creditors objected, and they declined to receive the questions or to join in the issue, on the grounds that their motion had been granted and that there was no question or issue of law raised, inasmuch as section twenty-six of the Act provided distinctly that the court might, on the application of any creditor, at all times require the bankrupt to attend and submit to examination, and that, if the bank-

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rupt wished to raise the question of the register's power to make the order before the return of the warrant, he could take the opinion of the Judge by a certificate of the register under the provisions of section six of the Act. The register declined to grant the motion of the bankrupt to adjourn the question into court, inasmuch as there was no issue joined, and decided that the proper course under the law, if the bankrupt questioned the right to make the order for examination before the warrant was returned, and desired to take the opinion of the Judge thereon, was to do so by a certificate of the register under the provisions of section six of the Act. The order requires the examination to take place on the 9th of October. The bankrupt objected to the action of the register, and requested four questions to be certified to the Judge, which has accordingly been done by the register.

1. Whether the matter of granting the motion for an order for examination should not have been adjourned into court for the decision of the Judge; and whether, after the bankrupt had tendered his points at issue, the register did not err in granting said motion, and in refusing to adjourn the same into court for the decision of the Judge?

As regards this question, the register states that he thinks that it was not necessary to adjourn the matter into court; *firstly*, because issue was not joined between the parties; *secondly*, because section six provides a sufficient, and the most usual way, to take the opinion of the Judge on the point, without suspending proceedings in the matter.

The question of granting the motion for an order for examination ought to have been adjourned into court for the decision of the Judge. The fourth section of the Act requires that, "in all matters where an issue of fact or of law is raised and contested by any party to the proceedings" before the register, "it shall be his duty



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to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the Judge." Now, the objection made by the bankrupt, before the register, to the granting of the order for examination, on the ground that the order could not be made before the first meeting of creditors, raised an issue of law, which was contested. That issue it was the duty of the register to adjourn into court for decision by the Judge. Instead of doing so, he granted the motion, and thus decided the issue of law himself. But the bankrupt, after raising the issue of law, appears to have argued it and submitted it for decision to the register, without requesting the register to adjourn it into court, and without objecting to its decision by the register. The granting by the register of the motion of the creditor disposed of the question, and, after that, there was no issue or question to be adjourned. It is the duty of the register to adjourn an issue of law into court without any request to that effect by a contesting party. But still such adjournment is a proceeding which a contesting party may waive, and, where he does waive it, by submitting the decision of the issue to the register, he cannot, after finding that the question is decided against him by the register, then ask to have it adjourned into court. If, instead of virtually requesting the register to decide the issue, by arguing the question and awaiting the register's decision, the bankrupt had, on raising the issue, requested the register to adjourn it into court, the case would have presented a different aspect. But as it was, the tendering by the bankrupt of his points after the decision, imposed upon the register no obligation to adjourn them into court.

2. Whether, under the bankrupt law, Tupper & Beattie are creditors who have proved their claim, so as to entitle them to make the motion?

In regard to this question the register states, that he considers Tupper & Beattie to be creditors who have

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proved their claim, they having fulfilled all the requirements of the law, and there being no restriction as to the time when the claim may be proved, after proceedings are commenced; that the first meeting of creditors is for the choice of an assignee by those who have proved their claims; that he can see no reason why creditors should wait until the return day of the warrant to make their proofs; that the debt which exists is the basis of the right to appear as creditor; and that creditors should be allowed to judge for themselves as to when they will take advantage of the law and appear.

I concur with the register in these views. The creditors in this case, having proved their claim, had a right to make the motion.

3. Whether, before the day appointed for the first meeting of the creditors, a creditor can, under the Act, prove his claim and so become a party to the proceedings in bankruptcy, as to be entitled to an order for the examination of the bankrupt under the twenty-sixth section of the Act?

In regard to this question the register states that he thinks that, when once a creditor has proved his claim, he has, unless the same be questioned, full right under the law, and may at any time call for an examination of the bankrupt.

The register is correct in this conclusion.

4. Whether, if, in the interval between the issuing of the warrant in bankruptcy and the day appointed for the first meeting of the creditors, and for proof of claims and choice of assignee, a deposition in proof of a claim against the bankrupt is filed, it is not the duty of the register to notify the bankrupt or his attorney before allowing the same, and entering it upon the list (Form No. 13), so that objection to the proof thereof may be made, if any exist, under section twenty-three of the Act?

In regard to this question the register states, that he does not think that the bankrupt need be notified of the

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filing of claims prior to the first meeting of creditors ; that it is a matter of no consequence to him whether creditors file them before or after ; and that the bankrupt, having surrendered all his property for the benefit of all his creditors, could, with perfect propriety and honesty, leave all questions connected with his estate to them, without regard to what disposition is made of it.

It is not the duty of the register to notify the bankrupt or his attorney, before the first meeting of the creditors, of the filing of such depositions in proof of claims as may be filed before such first meeting. Notwithstanding the filing of such a deposition before such first meeting, and the entering of the claim on a list (Form No. 13), the register may still, at such first meeting, under section twenty-three, postpone the proof of the claim and exclude the creditor from voting in the choice of an assignee. The court has, under section twenty-two, full control, at all times, of all debts and all proofs of debts, even after the depositions in proof have been filed ; and the bankrupt can, at the first meeting of creditors, object, under section twenty-three, to the validity of and the right to prove any debt, no matter whether the deposition in proof thereof is filed at such first meeting or was filed previously.

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In the Matter of Samuel M. Levy and Mark Levy, Bankrupts.

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OCTOBER, 1867.

**IN THE MATTER OF SAMUEL M. LEVY AND  
MARK LEVY, BANKRUPTS.****EXAMINATION OF WITNESSES IN BANKRUPTCY.—NOTICE.**

No notice need be given to the bankrupt of the examination of a witness called by the assignee in bankruptcy.

Such examination may be proceeded with, without reference to an examination of the bankrupt, which is being had on the part of creditors.

In this case, an examination of the bankrupts on the part of creditors was pending, and was adjourned to a day. The assignee applied for and obtained a summons to a witness to appear on a previous day and answer as to the bankrupts' property. On the return of the summons, the bankrupts also appeared, and objected to the examination of the witness, because no notice had been given to the bankrupts of the time and place of the examination, and because an examination of the bankrupts was pending, and the proceedings on it stood adjourned to a subsequent day, until which day no proceedings could, as the bankrupts claimed, take place except on consent of the bankrupts or reasonable notice to them.

The register directed the examination of the witness to proceed and certified the questions, raised by the bankrupts' objections, to the Judge.

BLATCHFORD, J. It was not necessary to give notice to the bankrupts of the time and place of the examination of the witness on the summons applied for by the assignee.

The examination of such witness was an independent proceeding, and could be proceeded with without reference to the examination on the part of the creditors.

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In the Matter of William L. Hamilton, on Habeas Corpus.

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OCTOBER, 1867.

IN THE MATTER OF WILLIAM L. HAMILTON,  
ON HABEAS CORPUS.HABEAS CORPUS AD TESTIFICANDUM.—MILITARY DESERTER.—  
PERSONAL IDENTITY.

Where a person, confined in prison in Philadelphia, was brought to this State in charge of an officer, under a writ of *habeas corpus ad testificandum*, issued out of this court, and, after his arrival here, applied to a State court and obtained a writ of *habeas corpus*, under the operation of which he was discharged by the State court from the custody of the officer, who returned to Philadelphia without him:

*Held*, That, as he was brought from Philadelphia under the writ issued by this court, and was still actually present before this court, he was still under its control, and must be sent back to the place from which he was brought for the purpose of testifying, and that, as his proper guardian had left him, he must be returned there by the marshal of this district.

Where a person, arrested as a deserter from the military service, was brought up under a writ of *habeas corpus* issued by this court, and the military authorities made return that he was regularly enlisted into the military service of the United States, which return the petitioner traversed, and, on the traverse, evidence was taken as to the identity of the petitioner with the person enlisted:

*Held*, That, on the proofs, the petitioner was the person enlisted, and that, as he was regularly enlisted, he must be remanded.

This case came before the court on a writ of *habeas corpus*, issued at the request of the petitioner, to procure his discharge from the military service of the United States. The return to the writ showed that he had been legally enlisted, and was held as a deserter. This return was traversed by the petitioner, and testimony was taken at considerable length before a United States Commissioner, upon the issues raised by the traverse. Upon this testimony, and some oral testimony, given by the petitioner himself in court, the case was argued.

In the course of the proceedings a collateral matter

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arose, which was first disposed of by the court. This matter arose out of the following facts: Before the issuing of this writ, Hamilton, being in Philadelphia, was arrested by the military authorities there as a deserter, and was by them sent to Governor's Island, New York, to be tried for desertion. On his application, however, before he left Philadelphia, a writ of *habeas corpus* in his favor had been issued out of one of the State courts. This writ was directed to one Captain Brown, who had had Hamilton in charge after his arrest. Brown made a return to the writ of *habeas corpus*, but that return was by the State court adjudged insufficient, and that court committed Brown to Moyamensing Prison, in Philadelphia, for contempt of the writ.

After the *habeas corpus* was issued out of this court, it was deemed important that Captain Brown's testimony should be taken in the matter, and for that purpose a writ of *habeas corpus ad testificandum* was applied for, and issued by this court, directed to the keeper of the prison in Philadelphia.

This writ was returned to this court as personally served upon the keeper of the prison at Philadelphia, who failed to make any return to it, and thereupon the court issued a writ of attachment against him, but, before this writ was issued to the marshal, Mr. Mann, the District Attorney of the State court in Philadelphia, appeared with the return of the keeper, and thereupon the default was waived, and the return submitted to this court. Mr. Mann stated to the United States District Attorney in New York, that if the court should hold that the return was insufficient there was no need of sending on an officer, but on letting the keeper of the prison know what the decision was, Captain Brown would be forthcoming. The court having decided the keeper's return to be insufficient, the United States District Attorney wrote to the keeper, telling him so, and directing him to have Brown before

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Commissioner Osborn, to whom it had been referred to take the evidence, on a day which he named. The keeper accordingly put Captain Brown in charge of an officer, who brought him to New York but did not report his arrival to the United States District Attorney in person. His arrival was, however, reported to the military officer who had charge of the proceedings in Hamilton's case on behalf of the military authorities, and he, without the knowledge of the United States District Attorney, applied to Judge Cardozo, of the Court of Common Pleas for the city and county of New York, and obtained a writ of *habeas corpus*, directed to the officer who had Brown in charge, to bring Brown before that court. On the return of this writ, the officer produced Brown before the Court of Common Pleas, but did not notify the United States District Attorney of the proceedings, and did not have with him any copy of the committal papers, and declined to have the case adjourned for the purpose of procuring them. Brown was thereupon discharged from the custody of the officer, who went back to Philadelphia without his prisoner. Brown then went before the commissioner and gave his evidence in Hamilton's case, and was present in court on the hearing. The authorities in Philadelphia having complained of the manner in which Brown had been discharged, the matter was brought to the attention of the United States District Attorney in New York, who, on the hearing of Hamilton's case, stated the facts to the court, and asked that, inasmuch as Brown had been brought here under the writ of *habeas corpus ad testificandum*, this court would order him to be returned to Philadelphia, in accordance with it, notwithstanding the proceeding before Judge Cardozo.

BLATCHFORD, J. Inasmuch as Captain Brown came here under the *habeas corpus ad testificandum* issued by this court, and is now before the court, he is not out of

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its power, and this court has jurisdiction of the matter. It was decided in the Kaine case, that a party who was brought up by a writ of *habeas corpus* was under the control of the court which issued it, till the writ was disposed of. The original writ in this matter bore the name of the District Attorney of the United States for this District upon its face. Yet the officer from Philadelphia, who brought Brown here in obedience to that writ, when served with the *habeas corpus* issued by Judge Cardozo, did not notify the District Attorney of this fact. It appeared from the petition on which Judge Cardozo's writ was issued, that it was not alleged in it that Brown was held by any writ of this court at all, but only by a commitment of the Court of Quarter Sessions of Philadelphia. And the return did not mend the matter, for it merely set out that Brown was held by an order of Mr. Perkins, the Superintendent of the prison in Philadelphia. This court will assume that, if the officer had made a proper return, Judge Cardozo would have done his duty and at once dismissed the writ. But, whatever may have been his private information, he was bound by the papers before him, and on those no valid reason for detaining the prisoner appeared. However, neither his action nor the negligence of the officer can affect the rights of this court. Captain Brown has never been out of its jurisdiction, and the court has but one course to follow. It must send him back to the place from which he was brought for the purpose of testifying, and, as his proper guardian has abandoned him, the marshal must return him there, leaving him to such remedy as he may think proper for any injury he may have sustained from the State Courts of Pennsylvania.

The question in Hamilton's case having been argued on the evidence, the following decision was rendered.

BLATCHFORD, J. The traverse to the return made by



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General Butterfield to this writ, denying that the petitioner was regularly enlisted into the service of the United States, and was regularly sworn on such enlistment, would appear to have been intended to raise the legal question of the regularity of the enlistment, and not the question of the identity of the petitioner. But the testimony has been addressed to the question of identity. The recruit was enlisted in Philadelphia, on the 1st of April last, deserted on the 6th of April, and the petitioner was arrested on the 20th of August. On charges being preferred against him, he was sent to Governor's Island for trial, and is now brought up on this *habeas corpus*, the point being made that he is not the same individual who was enlisted. Though the traverse does not seem to raise this question, yet, on the testimony, it is fair to the parties to dispose of the case on its merits. I have carefully examined the testimony, which was mainly taken before Commissioner Osborn. The only evidence produced by the petitioner is his own deposition. His language is very guarded on the question as to whether he did enlist. In the enlistment papers the recruit swore that he was twenty-one years of age. The petitioner swears that he is now nineteen, and has a mother living, his father being dead, and that he had been living with his mother in Philadelphia, until he was arrested there on the 20th of August. It is, therefore, to be noticed, that the petitioner admits that he lived in Philadelphia at the time of this enlistment. There is nothing in the case to show an *alibi*. The question of his enlistment was put to him, and he says that he does not recollect going to the office, and does not recollect signing the papers, and does not recollect taking the oath. The enlistment papers were shown to him, and he said that he could not read them, but he denied that either of the signatures was his. He was asked if he recognized Colonel Park, whose name is three times signed to the papers, and he said he did not. He was then asked if he was

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not enlisted before Colonel Park, and his answer was, "Not that I know of." On the other side, Colonel Park was sworn for the Government, and, on looking at the petitioner, he said that he recognized him; first saw him at the surgeon's office; saw him there on April 1st; that he saw the papers and swore to them before the witness; and that Hamilton remained under his charge till April 6th, when he deserted. Then the medical paper was produced, and Colonel Park testified that he was present at the examination, and that, as far as he could judge, the recruit was perfectly sober. Colonel Park's testimony is very direct and clear, and he recognizes Hamilton as the party who swore to and signed the enlistment papers. Still, if the case stopped here, it might be claimed that it was but one oath against another; but in addition to that, there is the correspondence of the petitioner's personal appearance with the description in the enlistment papers. He is described in them as having brown eyes, dark hair, and florid complexion, and being five feet seven inches in height. He has brown eyes, dark hair, and florid complexion, and, on measurement, he appears to be five feet seven and one-quarter inches in height—a very slight discrepancy. Another circumstance is his handwriting. There is a peculiarity in it which can hardly be the result of accident. The recruit signed his name, on enlistment, in two places, and, after the word "William," there is a period. That same period is found, in the same position, in the signature of the petitioner to his petition for the writ, and in his signature to the traverse of the return. In the latter he has written out his middle name in full—William Lewis Hamilton—and has put a period after the word Lewis also, showing that that was a habit of his, which is quite peculiar, and is a strong circumstance to show that the signatures are made by the same person. Moreover, the general correspondence of the signatures is such that there is no room to doubt that they were made

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by the same person. In view of the positive evidence of Colonel Park, the correspondence of the signatures, and the doubtful character of the petitioner's testimony, I can have no reasonable doubt that the petitioner is the party who signed the enlistment papers. Moreover, in the medical paper, the surgeon states that the recruit has a crucifix stamped on his left arm, and the petitioner admits that he has a crucifix on his left arm, with a Virgin Mary on each side. As the petitioner was the person who signed the enlistment papers, in which he swore that he was twenty-one years of age, he was regularly enlisted, and must, therefore, be remanded.

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OCTOBER, 1867.**THE SHIP SAILOR PRINCE AND HER FREIGHT.****MARSHALLING OF ASSETS.—SEAMEN'S WAGES.—MORTGAGEE.—  
JURISDICTION.—VESSEL AND FREIGHT.**

Seamen filed a libel for wages against a ship and her freight, and had a decree against them. The vessel was sold and her proceeds brought into the registry. The freight money was also attached, but was not brought into the registry, and the libellants applied to have their decree paid out of the proceeds of the ship. Their application was contested by one Patrick, who had filed a libel against the proceeds of the vessel, to which he claimed to be entitled, because he had purchased at sheriff's sale the interest of a foreign corporation which had held mortgages on the vessel which, as Patrick claimed, had become forfeited (thus making the corporation's title to the vessel absolute) at the time of the commencement of the suit, and the issuing of the attachment in pursuance of which the sheriff's sale of the vessel had taken place. Patrick claimed that the decree for seamen's wages should be satisfied out of the freight instead of out of the proceeds of the vessel.

An answer to Patrick's libel had been interposed by other claimants, who alleged that all the interest of the foreign corporation in the mortgages on the vessel

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had passed to them, before the commencement of the suit in which the attachment was issued.

*Held*, That the principle, that, where one creditor has two funds to resort to, while another creditor has a security on only one of such funds, the court will compel the former to resort to the other fund, if that is necessary for the satisfaction of both claims, is sometimes applied in the admiralty, but that it was not applicable to this case.

That the admiralty has no jurisdiction to enforce the claim of a mortgagee of a vessel.

That Patrick stood before the court only as having the rights of mortgagee, and his libel, being a libel by a mortgagee against the proceeds of the vessel, could not be maintained.

That that libel might, however, be treated as a petition.

That the court had no authority to adjudicate upon Patrick's title to the mortgages, which was contested by the other claimants.

That, even in disposing of claims against proceeds in the registry, this court refuses to consider a claim that is contested.

That Patrick's claim could not be set up to defeat or delay the claim of the seamen, and of the master and other persons interested, to be paid out of the proceeds.

That the allegation, that, prior to the attachment of the vessel, the mortgagee had taken possession of her, could not affect the question, because such taking possession was for the benefit of the real owner of the mortgages, and the question who was such real owner was the question in dispute between Patrick and the other claimants.

That the decree in favor of the seamen and the master must be satisfied out of the general fund in Court, leaving the question whether that payment should be charged against the proceeds of the vessel or the freight, to be determined on the final hearing on Patrick's libel.

THIS was a contest between different parties having claims upon a fund in court. The amount in the registry of the court arising from a sale of the vessel was \$8,869.58. The libellants had a decree for seamen's wages amounting to \$4,978.70, which was against the vessel and her freight. Other parties had claims against the vessel for wharfage, ballast, master's wages, consignees' disbursements, &c., &c., amounting in all to \$5,287.

The libellants, Murray and others, now applied to the court for an order that the decree in their favor be paid out of the proceeds of the ship. When the libel was filed, process was issued against the vessel and her

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freight. The process was not then executed on the vessel, because she was in the actual custody of the sheriff of the city and county of New York, under process issued to him from a State court of the State of New York. But the marshal returned that he had attached \$7,100 in gold, being freight money in the hands of Kirkland and Von Sachs. After the attachment of the freight by the marshal, the gold attached was, by arrangement, placed in the hands of Messrs. Evarts, Southmayd & Choate, and sold and invested in government securities. The marshal did not take possession of the freight money. Prior to the attachment of it by the marshal, it had been attached by the sheriff under the process so issued to him, and it was claimed to be held under such process of the sheriff at the time the marshal attached it. (*Ante*, p. 234.) On these facts this court held that there had been a valid attachment of the freight money in this suit, and that this court, therefore, had jurisdiction of this action. This decision was made on the 13th of June, 1867. On the 19th of July the vessel herself, she having been released from custody by the sheriff, was attached by the marshal on further process issued in this suit. The decree in favor of the libellants, Murray and others, was made on the 12th of September. The freight money was not in the registry of the court, but was still in the hands of Messrs. Evarts, Southmayd & Choate.

The application of Murray and others was opposed by William Patrick, who filed a libel in this court on the 11th of September, praying process against the proceeds of the vessel in the registry. The claim set up by Patrick was stated thus in his libel. Charles Lanier, on the 26th of September, 1866, brought a suit in the Supreme Court of New York against the Barned's Banking Company, an English corporation, and obtained an attachment against it for \$50,000, to the sheriff of the city and county of New York. The sheriff on the same day attached the *Sailor Prince* under the attachment. On

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the 10th of July, 1867, Lanier obtained a judgment in his suit, and took out an execution, on which the sheriff, on the 18th of July, sold the vessel to Patrick for \$100, which Patrick paid, receiving from the sheriff a bill of sale of the vessel. Patrick's libel averred that the Bamed's Banking Company were, on the 26th of November, 1866, the legal owners of the vessel, by virtue of two mortgages made by Dixon and Wynne, her owners, one in February, 1865, and one in September, 1865, and both owned by the company; that both of the mortgages had become forfeited, and the title of the company to the vessel had become absolute, before the 26th of November, 1866, by the failure of Dixon and Wynne to pay the mortgages; that Patrick, by becoming such purchaser, was the owner of the vessel, and was entitled to all the proceeds of the vessel, after the payment of all just claims against her which were prior liens to his; that, under the libels of Murray and others, process had been levied on both vessel and freight; that all of the wages and disbursements claimed by Murray and others and by Sadler, the master, were earned during the voyage of the vessel from Manilla to New York, next previous to her being seized by the sheriff; that the freight for her cargo from Manilla to New York was \$16,738.32; that the sheriff levied on the freight money under the Lanier attachment, and afterward the marshal levied on it under the process in this suit; that the freight money was afterward, by consent, paid over to Evarts, Southmayd & Choate, who held it subject to all the rights of the sheriff and the marshal, and of all parties interested in it; that this court had held that the attachment of the freight money by the marshal was valid, and that the freight money was under the control and subject to the order and disposition of the court; that the amount of the wages of the seamen and the wages and disbursements of the master were, by law, liens on the freight, as well as on the proceeds of the

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ship, while Patrick was entitled to only the proceeds of the ship ; and that right and justice required that this court should order the amount of the claims of the seamen and master to be paid exclusively out of the freight, without resorting to the proceeds of the ship in court, and that a sufficient amount of the freight should be ordered to be paid into court for that purpose, and that all the proceeds of the vessel in the registry, after deducting such claims as might be prior liens on such proceeds exclusively, should be paid over to Patrick.

The firm of Smith, Simpson & Co., of London, answered the libel of Patrick, and claimed that, by transactions between themselves and the Bamed's Banking Company, all the interest of that company in the two mortgages on the vessel passed, prior to November 26th, 1866, to Smith, Simpson & Co. ; also, that the rights of Patrick in the vessel and her proceeds were subordinate to those of Smith, Simpson & Co.

For Murray and others, *W. G. Choate*.

For Patrick, *G. De F. Lord*.

For Smith, Simpson & Co., *C. F. Southmayd*.

BLATCHFORD, J. The principle invoked on the part of Patrick, and under which the court is asked to deny the application of the seamen to be paid out of the proceeds of the vessel, is, that, where one claimant has two funds to resort to, while another creditor has a security on one of such funds only, the court will compel the former to resort to the other fund, if such a step is necessary for the satisfaction of both claims ; and that, whenever the election of a party having two funds will disappoint the claimant having the single fund, the court will control that election, and will compel the one to resort to that fund which the other cannot reach, and

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by these means will protect the claimant on the single fund. (*Coote's Adm. Pr.*, 122, 123.) This principle is a sound one, as a general principle of law, and is applied in courts of admiralty to a certain extent, and in cases to which it is properly applicable. But in none of the cases cited, and relied on, on the part of Patrick, has the principle been applied to a case like the present one. The cases of *The Trident*, (1 *W. Rob.*, 29), *The Constancia*, (4 *Notes of Cases*, 285,) *The Mary Ann*, (9 *Jurist*, 95,) and *The Dewthorpe*, (2 *Notes of Cases*, 264,) were all of them cases in which the question arose in regard to bottomry bonds. In *The Trident*, the question was between two bottomry bonds; in *The Constancia*, between two bottomry bonds and claims for seamen's wages, pilotage, and towage; in *The Mary Ann*, between a bottomry bond and a claim for seamen's wages; and in *The Dewthorpe*, between a bottomry bond and claims for pilotage, towage, and seamen's wages. Now, the jurisdiction of the admiralty in cases of bottomry bonds is unquestioned. It arrests the vessel and condemns and sells her at the suit of the holder of the bond. But the admiralty has no such jurisdiction at the suit of the mortgagee of a vessel. It never takes jurisdiction of such a mortgage to enforce its payment, nor will it try, by a possessory action, the title to, or the right of possession of, a vessel under a mortgage. This is the settled doctrine of the courts of the United States. (*Bogart v. The John Jay*, 17 *How.*, 399.) An enlarged cognizance of mortgages of vessels was given to the admiralty court in England by the statute of 3 and 4 Victoria, chap. 65, but no similar law has been passed by Congress. Patrick does not stand before this court with any higher claim than that of a mortgagee. He claims to represent, and stand in the place of, the *Barned's Banking Company*, as owners of the mortgages on the vessel, and to have all their rights. As mortgagee, he could not have brought his libel against the vessel. And, although it is true



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that the admiralty can, where proceeds are rightfully in its custody, entertain supplemental suits by parties in interest, to ascertain to whom the proceeds rightfully belong, and deliver them over to the parties who establish the lawful ownership thereof, (*Andrews v. Wall*, 3 *How.*, 573,) yet it was decided by the Supreme Court, in the case of *Schuchardt v. The Ship Angelique*, (19 *How.*, 239,) that, where a mortgage existed upon the moiety of a vessel, which was afterward libelled, condemned and sold by process in admiralty, and the proceeds were brought into the registry of the court, the mortgagee could not file a libel against a moiety of those proceeds. The libel of Patrick is such a libel, and, therefore, cannot be maintained. His claim is before the court only on his libel, and his objection to the application of the seamen is founded solely on his libel. That would, therefore, be a sufficient answer to his objection in the form in which it is now made. But, as was intimated by the Supreme Court in the case of *Schuchardt v. The Angelique*, a mortgagee of a vessel can, when its proceeds are brought into the registry, after a sale, apply to the court by petition, claiming an interest in the fund. It is proper, therefore, to consider the claim of Patrick, as mortgagee, to have the seamen thrown upon the freight for their payment, on the assumption that Patrick is before the court in a proper way.

I find no authority for the course of practice urged on the part of Patrick. On the contrary, in the case of *The Fortitude*, (2 *Notes of Cases*, 515,) Dr. Lushington, the same judge who had previously decided the case of *The Dewthorpe*, refused, either in the exercise of the ordinary jurisdiction of the court, or in virtue of the enlarged power given to the court by the statute of 3 and 4 *Victoria*, chap. 65, to entertain a suit, brought by the mortgagee of a share in a vessel, against the vessel and her freight, the vessel being under arrest for wages, and the aid of the court being asked to arrest the freight.

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The court placed its want of jurisdiction on the ground that the mortgagee could not have an original action against the freight, and that the court could not adjudicate upon the title to the freight, which was disputed by the owner of the share that was not mortgaged. The court also says (page 523), that, in the case of *The Dewthorpe*, it was induced to go the full length of the authority it had. Now, in the present case, the court is asked to adjudicate upon the title to these mortgages. They are claimed by Patrick, and also by Smith, Simpson & Co. The suit by Patrick, on the issues raised by the answer of Smith, Simpson & Co., resolves itself into a contest as to the ownership of the mortgages. It is not a question of title to the vessel, for, under the process of the State Court, nothing was or could be attached or sold but the right, title and interest of the State Court debtor in the vessel. The suit in the State Court was not one *in rem* against the vessel, and, under the sale at which Patrick bought, he could acquire no better title to the vessel than Lanier's debtor possessed, and it was that title, and not the vessel itself, which he bought. (*The Moses Taylor*, 4 *Wallace*, 427.) If, therefore, the Barned's Banking Company had no interest in the mortgages, and thus no interest in the vessel, Patrick has no standing in court. That he has, for that reason, no standing in court, is asserted by Smith, Simpson & Co., who claim that they had acquired all the interest of the company in the mortgages. The adjudication of a question of this kind is peculiarly the province of a court of equity, and is not within the usual functions of a court of admiralty. In the case of *The Saracen*, (6 *Moore*, 74,) Lord Langdale says: "With respect to the equitable jurisdiction of the court of admiralty, it is true that, in the decision of cases properly within the jurisdiction of the court of admiralty, equitable considerations ought to have their weight, but it does not thence follow that the court of admiralty has

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jurisdiction to do all that courts of equity may do, in suits instituted by persons suing either for themselves, or on behalf of themselves and others, for the administration of assets, or the distribution of a common fund in which several persons are interested, or upon which they have claims. No instance of the exercise of any such jurisdiction has been cited, and, in the absence of any authority, it does not appear to us that there is any such jurisdiction." And, even under the power of the court to dispose of proceeds in the registry, the court, in its discretion, refuses to consider a claim that is contested. (*Leland v. The Ship Medora*, 2 Woodb. & M., 114; *The Maitland*, 2 Hagg., 253.) The principle on which the court acts in disposing of proceeds in court, is not to assume the jurisdiction of a court of chancery, to compel parties to submit to a marshalling of assets, in the usual acceptation of that authority. (*The Rodney*, 1 Blatch. and How., 229.) I think, therefore, that I should be departing from the settled course of practice in admiralty, if I should allow the claim set up by Patrick to be interposed to delay or control in any way the payment of the seamen and the master and the other parties interested, out of the proceeds of the vessel in the registry. Seamen are peculiarly wards of the court, and their claims, and the other admiralty claims against the vessel or her freight, ought to be adjusted and paid without reference to the contest between these rival claimants to the mortgages on the vessel. They will be so adjusted on a hearing of all parties concerned, other than Patrick, and Smith, Simpson & Co.

After the above decision was rendered, an application was made on behalf of Patrick for leave to amend his libel, which was granted to him, and on this amended libel he renewed his application.

BLATCHFORD, J. The only averment contained in the amendment is, that the mortgagee, whose interest

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Patrick claims to have acquired and to represent, through a sale of it by the sheriff in the State Court, on an attachment issued against such mortgagee, had, prior to the issuing of the attachment, assumed the possession, management, and control of the vessel, and had paid the wages of the seamen employed in her, and that, by reason of those facts, and the other facts stated in the libel, Patrick became, and, at the time of such libel, was, the legal owner of the vessel, and was entitled to her possession, and was lawfully in possession of her, and is entitled to all her proceeds. The only new fact averred, that was not in the libel when the case was before the court on the former occasion, is, that the mortgagee was a mortgagee in possession, exercising acts of control and ownership over the vessel. The original libel averred that the mortgages had become forfeited, and the title of the mortgagee to the vessel had become absolute, before the issuing of the attachment by the State Court, and that thereby the mortgagee became the legal owner of the vessel, and that Patrick represented the title of the mortgagee.

The difficulty in the case on the part of Patrick is, that the taking possession of the vessel by the mortgagee does not vary the question, so far as the controversy is concerned of which this court is asked to take cognizance. Although the mortgagee did take possession, and although, as between him and the mortgagor, that act may, in connection with the non-payment of the mortgages when due, and their consequent forfeiture, have been sufficient to divest the mortgagor of what title he had, and vest it in the mortgagee, yet, if, at the time of so taking possession, the mortgagee did not own the mortgages, but had previously passed away all interest in them to Smith, Simpson & Co., such taking possession either amounted to nothing so far as the mortgagee was concerned, or else it inured to the benefit of the real owner of the mortgages. The right of the

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mortgagee to take possession in his own right, or except as representing the real owner of the mortgages, being contested here by Smith, Simpson & Co., the contest here is still one between Patrick, claiming that the interest in the mortgages remained in the mortgagee, who then took possession, and is now represented by Patrick, and Smith, Simpson & Co., who claim that the interest in the mortgages did not remain in the mortgagee, but had been transferred to them. The contest here, therefore, remains what it was before the libel was amended—merely a contest as to the ownership of the mortgages. The court cannot reach any decision on the libel without adjudicating as to the title to the mortgages. The mere act of taking possession by the mortgagee could not destroy the claim of Smith, Simpson & Co. to the mortgages, if they had previously acquired the interest of the mortgagee in the mortgages, as is claimed by them in their answer to Patrick's libel.

I am, therefore, of opinion that the libel of Patrick, even as amended, cannot be allowed to be interposed to control the payment of the seamen, for the reasons set forth in my former opinion.

So far as the seamen, wards of the Court, and the master, whose claims are peculiarly admiralty claims, and are claims against both ship and freight, are concerned, Patrick is not entitled to compel them to become parties to a marshalling of assets, and to wait for the payment of the amounts decreed to them, until it can be determined whether as against Patrick they ought not to be paid exclusively out of the freight. They must be paid, and paid at once, out of any funds of which the court has control, on which they have a lien, without regard to Patrick's claim. But this can be done without doing injustice to Patrick. The decision of the court on the questions raised by the libel of Patrick has been made on motion, and not on the formal decision of the suit brought by him, on a final or plenary hearing. If

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Eight Barrels of Distilled Spirits.

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this court is wrong in its views, and disposes finally now, on motion, of the fund in which Patrick claims an interest, he will perhaps be cut off from the opportunity of correcting by appeal any error that may have been committed by this court. But if, while the seamen and master are paid, and paid promptly out of the money which the court has at its disposal to pay them, that is, out of the proceeds of the vessel and the freight indiscriminately, on both of which their claims are liens, and against both of which they have decrees, the question as to whether, as regards Patrick and his claim, the claims of the seamen and master shall be charged against the vessel exclusively, or the freight exclusively, or both, and, if both, in what proportions against each, can be left open to be decided on the hearing of the libel filed by Patrick. This will do substantial justice to all parties, and an order for payment will be made accordingly.

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OCTOBER, 1867.

**EIGHT BARRELS OF DISTILLED SPIRITS FOUND  
IN SEVENTH AVENUE NEAR FIFTY-SECOND  
STREET.**

**INTERNAL REVENUE.—INFORMER'S SHARE.—TREASURY REGULATIONS.**

Under the one hundred and seventy-ninth section of the Act of June 30th, 1864, as amended by the Act of July 18th, 1866, where the marshal sells forfeited property under a *venditioni exponas*, the informer becomes entitled to his share when the proceeds are paid to the marshal, and his share is to be determined by the regulations then in force.

In this case the property was forfeited for violation of

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the Internal Revenue Law, and was sold by the marshal under a decree of the court, on a *venditioni exponas*. After the proceeds were in the marshal's hands, but before their distribution, the Secretary of the Treasury made new regulations as to the shares of informers. A motion was now made in behalf of the informer, to have his share paid to him in accordance with the former regulations.

For the informer, *Henry & Clarkson*.

For the United States, *B. K. Phelps*, (*Assistant United States Attorney*.)

BLATCHFORD, J. The proceeds of the forfeiture in this case having been paid into court on the 17th of August last, are not, so far as the share of the informer in them is concerned, subject to the provisions of the supplementary regulations made by the Secretary of the Treasury on the 2d of September, 1867. Under the one hundred and seventy-ninth section of the Act of June 30th, 1864, as amended by the Act of July 13th, 1866, the informer, in the case of a sale by the marshal of forfeited property under a *venditioni exponas*, becomes entitled to his share of the proceeds thereof, when such proceeds are paid to the marshal. The informer's right then becomes vested, and his share is to be determined by the regulations then in force, and cannot be affected by any regulations subsequently made.

Motion granted.

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In the Matter of John Bellamy, a Bankrupt.

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OCTOBER, 1867.

IN THE MATTER OF JOHN BELLAMY, A  
BANKRUPT.ORDER DIRECTING REGISTER TO EXAMINE THE PROCEEDINGS AND  
CERTIFY.—GENERAL AND SPECIAL ORDERS.—SERVICE OF NOTICE.

Form No. 4 in bankruptcy is not a special order, but a "general order," under rule 5 of the General Orders in Bankruptcy.

The special order, directed by the previous decision in this case to be made in every case in bankruptcy, is necessary.

The clerk must mail the notices, form No. 52.

The order, form No. 51, though the register is to direct it to be issued, is to have the signature of the clerk and the seal of the court.

When a register directs that order to issue, he is at once to transmit to the clerk a list of all the proofs of debt in the case, which have been furnished to the register or the assignee, containing the names, residences, and post-office addresses of the creditors, with particularity enough to enable the notices, form No. 52, to be served properly.

After the rendering of the decision in this case, heretofore reported (see p. 390, *ante*), the register to whom the case was referred requested the court to reconsider that opinion. He suggested that the order, directed by the previous decision to be made in each case, was unnecessary, because the first order of reference (form No. 4) was not a general order, but a special order, and was by its terms broad enough to cover what was to be done under the order directed by the decision. He further suggested, that the notices, form No. 52, should be served by the register instead of by the clerk, as the clerk would have no knowledge of the facts necessary for such service, and that to have them sent by the clerk would be inconvenient and expensive; that the note at the end of form No. 52 was probably an error; and that, as the court had in this case decided that an order in the midst of the proceedings could not require the seal of



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the court, and had directed that the order (form No. 51) should be issued by the register, so the certificate of service upon the creditors should be made by the register also.

BLATCHFORD, J. I regard the special order referred to as necessary, certainly so far as the requirement is concerned that the register shall examine and certify as to the regularity of all the proceedings, which is one of the principal points in the special order. That requirement is not covered by the order of reference, form No. 4. Form No. 4, in referring it to the register "to take such other proceedings therein as are required by the Act," means such other proceedings required by the Act, as the Act requires the register to take. The Act does not require the register to examine and certify as to the regularity of the proceedings with a view to the discharge, and it may be doubtful whether it requires the register to make the order to show cause on the petition for a discharge. I therefore regard the special order as necessary.

Form No. 4 is not a special order, but is what rule 5 of the "General Orders in Bankruptcy" calls a general order made by the District Court in the case. That rule speaks of the power of the District Court to make a general order "in each case," fixing the time when and the place where the register shall act upon the matters arising under the case. Form No. 4, the order of reference, is such a general order.

If any inconvenience in practice shall result from the making of such special orders, and it shall be brought to the notice of the court, the court will cheerfully consider the subject again. But no such inconvenience is stated as having arisen.

I am satisfied that, under rule 30 of the "General Orders in Bankruptcy," taken in connection with the note at the end of form No. 52, the clerk must mail the notice, form No. 52, when it is served by mail. Such

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The Steamer Alabama and the Steamtug Gamecock.

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note is, I think, not an error. Nor is it an error to put the seal of the court and the clerk's name to the order to show cause in form No. 51. I have not decided that an order in the midst of the proceedings cannot, with any propriety, require the seal of the court. The order in form No. 51, although the register is to direct it to be issued, is to have the signature of the clerk and the seal of the court.

It will be regarded as a standing rule, that every register shall, immediately on directing an order to show cause, form No. 51, to issue, transmit to the clerk a list of all the proofs of debt in the case which have been furnished to the register or the assignee, containing the names, residences, and post-office addresses of the creditors, with sufficient particularity to enable the notices, form No. 52, to be served properly.

If this practice is expensive or inconvenient (which has not appeared), or shall hereafter appear to be expensive or inconvenient, the difficulty lies in the law, and in the "General Orders" framed by the Supreme Court, and not in their administration. This court can only apply and carry out the law and the rules as it finds them, according to its best judgment.

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OCTOBER, 1867.

## THE STEAMER ALABAMA AND THE STEAM- TUG GAMECOCK.

COLLISION.—TOW AND TUG.—LOOKOUT.—LIGHTS.—PILOT.—  
PLEADING.

The bark *Ninfa de los Mares* was coming up the Narrows into the harbor of New York, about 200 yards from the west shore, in the evening. She was

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The Steamer Alabama and the Steamtug Gamecock.

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towed by the steamtug Gamecock at the end of a hawser. She had the regulation lights set. The tug, however, did not carry the two white lights required by law to be carried by a steam vessel having another in tow, but had the lights required to be carried by all steam vessels. The steamer Alabama was going down the Narrows to sea. She was in charge of a pilot, but had no look-out stationed forward, the quartermaster in the wheelhouse, who was assisting the man at the wheel, being the only lookout. She saw the lights of the tug, and directed her course so as to pass her some fifty or a hundred feet to the eastward, but she did not see the lights of the bark in tow until she was very near the tug, when the latter gave two whistles, and a voice from her shouted that the steamer would run into the bark. The steamer's helm was at once put hard a starboard, but she ran into the bark, striking her on her starboard bow, and sinking her in a few minutes. The libel was filed against both the steamer and the tug, to recover the damages.

*Held*, That the Alabama was in fault in not having a proper lookout, and that her going so close to the tug, when there was abundant sea room, was, to say the least, not evidence of very careful management on her part.

That the fact of her being in charge of a pilot was no defence.

That the tug was also in fault in not having the lights required by law, and that the collision was the result of these faults on both vessels.

That where injury is done by or received by a vessel in tow of another, the inquiry, by which the responsibility of either vessel is to be determined, should always be as to which party is the principal and which is the servant.

That in this case the tug was the principal, and the Alabama could not charge the tug's negligence as a fault upon the bark.

That the fact that the libel did not specify the want of proper lights on the tug as an element in her negligence made no difference, there being no dispute as to what lights the tug had, and no surprise upon her as to the evidence given about her lights. That, if desired, an amendment of the libel to that effect would be allowed.

This was a libel for a collision brought by Nicholas de las Casas, the owner of the Spanish bark "Ninfa de los Mares" against the steamer "Alabama" and the steam tug "Gamecock," both of them American vessels. The collision occurred about six o'clock P. M. on the 15th of December, 1865, in the Narrows, a little below Fort Richmond, on the Staten Island side, and about 200 yards easterly from the shore. The bark was on a voyage from Havana to New York, and was in tow of the tug going up through the Narrows to New York. She was towed by a hawser

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about fifty or sixty fathoms long, running from the stern of the tug to her port bow. The Alabama was proceeding to sea from New York on a voyage to New Orleans. The Alabama and the bark came into collision, and the result was that the bark was cut to the water's edge, on her starboard bow, near her fore-rigging, and sank, and was totally lost. The bark charged the fault on both of the other vessels.

The case made by the libel was, that some ten or fifteen minutes before the collision, the port light of the Alabama was observed from the bark, bearing from one and a half to two points on her starboard bow, and apparently approaching in an opposite direction; that the bark had her proper lights set; that her course was about north to north half-east; that her movement was wholly dependent upon that of the tug, her master having employed the tug about 1 o'clock P. M. of that day to tow her to New York; that a few minutes before the collision a double whistle was heard from the tug, as a signal for the Alabama to pass the tug and bark on their starboard side, and for the bark to starboard her wheel, and that the tug would starboard her wheel; that this was done by the tug, but that the Alabama came right on into the bark, although the bark, by starboarding her wheel, in obedience to the signal of the tug, did all that she could to avoid the collision; and that there was no fault on the part of the bark. In regard to the fault of the other vessels, the libel averred that the collision happened "wholly through the carelessness, mismanagement, and improper seamanship of those in charge at the time of the said steamer, and of the said tug boat, in suffering their respective vessels to approach so near each other, and then on the part of those in charge of the said tug boat, in permitting the said bark to be so hit, and on the part of those in charge of the said steamer, in permitting her to so hit the said bark."

The answer of the Alabama set up, that she left her

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dock in New York about five o'clock P. M., under charge of a pilot ; that her lights were set and burning, and she was going at a slow rate of speed, and had a competent lookout properly stationed and faithfully attending to his duty ; that shortly after 6 o'clock P. M., when the Alabama was near Fort Richmond, she discovered the tug a considerable distance off, bearing on her port bow ; that, as the vessels approached each other, the tug changed her course suddenly, without giving any warning, and attempted to cross the Alabama's bow, and pass on her starboard side ; that as soon as that intention was manifested, every effort was made by the Alabama to avoid a collision, and she cleared the tug but collided with the bark ; that the night was dark, and the fact that the tug was towing the bark on a line could not be seen or known from the Alabama before the vessels came together, or so nearly together that it was impossible to avoid a collision with the bark ; that the bark had all her sails furled and could not be distinguished from a vessel at anchor, and had no proper lights or lookout, and no warning was given that she was moving astern of the tug ; that the bark was responsible for the conduct of the tug, and the tug and the bark were respectively improperly and unlawfully navigated ; and that the collision occurred through the fault and improper navigation of the bark, individually or in common with the fault of the tug, and not by the fault of the Alabama.

The answer of the tug averred that the towing was to be and was performed in the usual manner ; that the collision did not occur through the fault of those on board of the tug ; that when the Alabama was first observed from the tug she bore on her starboard bow, sailing in an opposite direction ; and that she should have stopped or passed the tug and bark at a safe distance to the eastward, as she was well able to do, in which case the collision would not have taken place.

The bark had a pilot on board, and was steering as

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nearly as possible in the wake of the tug. Her proper lights for a sailing vessel being towed were set and burning, that is, a green starboard light and a red port light, and they were properly arranged. She carried no light calculated to mislead the Alabama. The tug had the proper green and red side lights, but she did not have the two white mast-head lights arranged vertically, which were required by law to be carried by a steam vessel, when towing another vessel, in addition to the colored side lights, in order to distinguish her from other steam vessels. Instead of those lights she had a single white light on a flag pole aft. The Alabama had her proper colored side lights and her white foremast light. In this condition of the lights on the vessels they approached each other.

The pilot of the Alabama testified, that he was heading south half-west when he first saw the lights of the tug, two miles or more away; that he was then a little above Clifton, and about a quarter of a mile from the shore, and the tug's lights bore south half-east, half a point or a little more on his port bow; that he then saw her green and red lights and her white light above; that, on seeing those lights, he ordered the man at the wheel to look out for his port wheel so as to pass to the right; that he then discovered that the tug was trying to cross his bow, the tug being to the eastward of the lights on Sandy Hook and the Navesink Highlands, and those lights being half a point to the eastward of the course of the Alabama, and the tug appearing to him to be drawing across those lights to go to the westward of the Alabama; that he then ordered the man at the wheel to keep his helm starboard, and it was kept starboard until he discovered that the tug would go clear of the Alabama, and then he told the man at the wheel to steady; that the next thing he heard was two blasts from the steam whistle of the tug, which came when the tug was not more than sixty feet from the Alabama; that at

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that time he saw the green and white lights of the tug; that at the time the whistles blew he heard a hail from the tug, warning him that he would be on the bark; that the helm of the Alabama was immediately put hard to starboard, and her engine was slowed, and stopped and backed, but she struck the bark within a minute after the hail; that he did not know until the hail that the tug had a vessel in tow; and that he saw no lights on the bark. On his cross examination he said that when he saw the tug drawing to the westward he starboarded to let her go to the westward of him, and straitened on his course when he thought the tug had room enough to go clear on the westward; that the whistles blew right after he straitened on his course; that he arrived at the conclusion to let the tug pass to the westward of him from three to five minutes before the tug blew the whistles; and that he expected the tug to pass him from fifty to one hundred feet off.

The captain of the tug testified that he was as near the Staten Island shore as he considered it safe to go with the bark; that up to the time he blew his whistles the Alabama was all the time on his starboard bow, that he did not change his course up to the time he blew his whistles; that when he blew his whistles he starboarded his wheel a little—all he dared, as he was then within two hundred yards of the shore; that when the Alabama was a quarter of a mile away, he saw her white light and both of her colored lights; and that the tug was heading between north and north by west.

For the bark—*E. W. Stoughton and J. E. Parsons.*

For the tug—*Beebe, Donohue and Cook.*

For the steamer—*Owen, Nash and Gray.*

BLATCHFORD, J. I take the testimony of the two

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witnesses who were piloting the respective steam vessels as showing more clearly than any other testimony the actual course of the navigation of the vessels. The captain of the tug, who was in her pilot house at the wheel all the time, had no apprehension of any collision with the Alabama. He did not put his helm to port, or change his course, or signify, by giving one blast of his whistle, that he desired each vessel to keep to the right. As to any change of course by the tug, I think the clear weight of the testimony is, that the tug did not change her course before she blew the two whistles at the very moment of peril. The pilot of the Alabama did not blow any whistle as a signal to the tug to take the one side or the other. He arrived at the conclusion that the tug was going to the westward, and, acting on that conclusion he starboarded his helm until he thought he could go clear of her on the eastward, and then he straightened on his course, intending to clear her by from fifty to one hundred feet. The tug did not port her helm, and thus bring herself and the bark into the danger which the Alabama was trying to avoid. She kept her course, and any apparent drawing of the tug to the westward, as seen from the Alabama, must have been the effect of the starboarding by the Alabama of her own helm, and not the cause of that starboarding. If the Alabama had thought that she and the tug were meeting end on, or nearly end on, so as to involve risk of collision, she would have ported her helm and signalled the tug by her whistle. But the Alabama starboarded her helm and gave no signal, and for the manifest reason that she apprehended no collision; and the tug certainly apprehended none. The Alabama was in no manner thwarted by the movements of the tug or of the bark, in carrying out her purpose of going to the eastward. She elected to go to the eastward a sufficient length of time before the collision to enable her to carry that intention safely into execution, as respected both the tug and the bark,



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but for two circumstances. These were (1st) the resolve of the Alabama to pass as close to the tug as within from fifty to one hundred feet; (2d) the absence of all knowledge on the part of the Alabama that the tug had a vessel in tow. The intention of the Alabama to pass so close to the tug would not perhaps, of itself, unattended by any other facts, be sufficient to charge her with fault in this collision with the bark. But she had abundance of room to the eastward, and a broad channel in that direction, seven or eight times in width the distance at which the tug was from the western shore, with sufficient depth of water, and it was, to say the least, not evidence of very careful navigation on the part of the Alabama, that she did not try to give a wider berth to the tug. But still the Alabama went clear of the tug, and she would doubtless have gone clear of the bark, if she had known that the bark was in tow astern of the tug. The failure of the Alabama to know that the tug had the bark in tow is shown, by the evidence, to have been owing to two things—(1st) the absence, on the Alabama, of a proper lookout, properly stationed and attending exclusively to the proper duties of a lookout; (2) the failure of the tug to carry the two bright white masthead lights vertically, so as to distinguish her from other steam vessels. As to the lookout on the Alabama, the evidence is conclusive that the only person who pretended to be discharging the duties of a lookout was Pullin, the quartermaster, and he, instead of being at his proper post on the bow of the vessel, was in the pilot-house assisting the man at the wheel. The rest of the men who were in the watch with Pullin, and some of whom ought to have been on the lookout on the bow of the vessel, were in the forecabin at their supper, and remained there till after the collision. The attempt to show that there was a man on the lookout on the bow of the Alabama wholly fails. No such man is produced as a witness, nor is his name disclosed.

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Now, if any fact is established by the evidence, it is the fact that the bark had her colored lights properly set and burning. They ought to have been seen from the Alabama, and probably would have been seen if the Alabama had had a proper lookout. It is true that the pilot of the Alabama, and the other persons who were in and about the pilot house of that vessel, saw the lights of the tug and did not see the lights of the bark; but it is extremely probable, from the evidence, that a proper and vigilant lookout on the bow of the Alabama would have discovered the lights of the bark. There was nothing in the character of the night to obscure them. The men on the bark saw the lights on the Alabama at a long distance. Moreover, the evidence goes to show that a proper lookout in a proper place on the Alabama would have discovered the bark herself in season to have enabled the Alabama to clear her. It is impossible to resist the conclusion, that the want of a proper lookout on the Alabama contributed materially to the collision. So, also, the absence of the proper lights on the tug contributed in a great degree probably to the collision. The pilot of the Alabama discovered the lights of the tug at the distance of two miles or more, and saw them accurately, as they were, the two colored lights and the white light above. He recognized them, so far as the evidence shows, for what they indicated—a steam vessel under way. But he did not recognize them as indicating a steam vessel towing another vessel, for the reason that they gave no such indication. The provision for the two vertical white lights is made by law, as the statute expressly says, to distinguish from other steam vessels a steam vessel towing another vessel. The conclusion of fact and of law is, that if the pilot of the Alabama had been advised by the presence of those lights that the tug had a vessel in tow, he would have given her a wider berth than he did, and would have cleared the bark.

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It is claimed on the part of the tug that the pleadings do not raise the question of the want of proper lights on the tug. But I think the pleadings are sufficient to raise that question. The libel does not specify the want of lights on the tug, but it avers that the collision happened through the carelessness, mismanagement and improper conduct of those in charge at the time of the tug, in suffering the tug and the Alabama to approach so near each other. The want of proper lights on the tug was an element and ingredient of the carelessness of those in charge of the tug, which contributed to the near approach of the Alabama. But, if desired, an amendment of the libel in that respect would be allowed, there being no dispute as to what lights the tug in fact had, and no surprise upon her as to the evidence given about her lights.

The bark being wholly without fault, and the collision being due to the negligence of the Alabama and the tug, it would naturally follow that the bark would be entitled to recover from the Alabama and the tug the damages caused by the collision. The answer of the Alabama sets up, however, that the bark was responsible, under the circumstances, for the conduct of the tug; and it is claimed that the tug was the servant of the bark in the towing service; that the bark is liable for the acts of the tug; that the case, so far as respects the Alabama, must be decided as if the only parties litigating were the Alabama and the tug; and that the bark has no greater rights as against the Alabama, than the tug would have had, if she had been injured by the collision, and her owner were the sole libellant. There is a conflict of decisions on this point, and it is not authoritatively settled for this Court. Most of the cases on the subject are cases where the third vessel, neither the tug nor the tow, was the libelling or complaining party. In regard to the question whether the tug or the tow is responsible when a third party sues for a collision with either, the author of *Parsons' Maritime Law*, (vol. 1, p. 208,) cites several of the conflicting author-

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ities, some of them holding that the vessel towing is but the servant of that which is towed, and that the latter is responsible for the acts of the former, as its servant, and others holding that the vessel towed is for the time under the absolute control of the vessel towing, and that the latter is responsible for any mischief done, and draws the conclusion, that it is an error to assume that either of these relations *must* exist in any particular case, and that the inquiry should always be, which party is the principal and which the servant. Such I conceive to be the sound rule. The language of Mr. Justice Nelson, in the case of *The Express*, (1 *Blatchf. C. C. R.*, 368,) seems to imply, that where the tug is not in fact, at the time, under the direction and control of the master and hands on board of the tow, the tow will not be responsible for any damage that happens through the fault of the tug. In the case of *Sturgis v. Boyer*, (24 *How.*, 110,) which was a libel by a third vessel against a tug and her tow for a collision between the tow and the third vessel, the Supreme Court condemned the tug and acquitted the tow. In the course of the opinion of the Court in that case, it is said (*p.* 122) that, "whenever the tug, under the charge of her own master and crew and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels." It is also said, in that case, (*p.* 123) that the owners of the tow do not, by employing a tug to transport their vessel from one point to another, necessarily constitute the master and crew of the tug their agents in performing the service; that they do not appoint the master of the tug or ship the crew, and cannot displace the one or the other; and that the master of the tug, notwithstanding the contract for the service was negotiated with him,

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continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation. It is true that these observations were made in reference to the liability of the tug and the tow to a third party. But I think that they are also applicable to a case where the tow sues the tug for an injury caused to the tow by a collision between the tow and a third vessel, to which the negligence of the tug contributed, and also to a case where the tow sues the third vessel for such an injury. In the present case, the tug was exclusively under the charge of her own master and crew. She was employed in the usual and ordinary course of her employment, to tow this bark, a foreign vessel, coming into one of our ports. The service was a customary and proper one. The pilot and master and crew of the bark did not direct, or undertake to direct, the navigation of the tug or the arrangement of her lights, and were not bound to do so. The bark did nothing but follow as closely as possible in the wake of the tug, and she made no manœuvre which contributed to the collision or interfered with the free control of the tug over her own movements and arrangements. To say that, under these circumstances, the bark should be held responsible for the acts or omissions of the tug, would be, in my judgment, to violate the sound principles of justice. Such a responsibility on the part of the bark would make her liable to a third vessel, in case the tug had negligently run into and sunk such vessel, the bark having been navigated precisely as she was in this case. A responsibility so broad would be greatly injurious to the interests of commerce, and would effectually put an end to the towing business, for no tow would then be towed unless it had the exclusive control of the tug, and no tug would surrender such control to the tow.

If applied to this case, the effect of the doctrine contended for by the Alabama, that the tug and the bark are to be considered as one vessel, and that the bark, though

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personally innocent, is to have imputed to her the acts and omissions of the tug, would be, as against the Alabama, to cause the damage occasioned by the collision to be apportioned between the tug and the bark, considered as one vessel, and the Alabama. I hold that the Alabama is not entitled to the benefit of any such doctrine. The tug does not, in her answer, claim the existence or benefit of any such doctrine, or claim that the bark was responsible for the faults of the tug, or that the tug is not responsible for her own faults to the bark. It is useless to speculate whether, even if, as regards the Alabama, the tug and the bark be considered as one vessel, the tug ought not, as between herself and the bark, both the tug and the Alabama being in fault, to make good to the bark all the damages which she does not recover from the Alabama. As suggested by Mr. Justice Nelson, in the case of *The Express*, (before cited,) there is a difficulty, as between a tug and her tow, in assigning to each vessel its proper measure of responsibility, when either, through the fault of either, comes into collision with a third vessel. Every case of the kind must be decided, as it arises, on the facts attending it.

It is set up as a defence by the Alabama, in her answer, that she had on board, at the time of this collision, a pilot duly licensed under the laws of the State of New York, who offered his services to her, and whose services she was obliged by law to accept; that such pilot took and had the entire control of all her movements until and at the time of the collision; that her master, officers and crew merely carried out the orders of such pilot, in directing her movements; and that, if the collision was caused by the movements of the Alabama, or by her failure to make proper movements in reference to the tug and the bark, or either, neither the Alabama nor her claimants are responsible therefor. This point of defence does not extend so far as to claim that the Alabama is not responsible for not having a proper lookout, or that

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the pilot was in any manner charged with the duty of seeing that she had a proper lookout. And in a case where, as here, the fault found against the vessel is not any act or omission for which the pilot is responsible, but is the want of a proper lookout, it would be going too far to say that the vessel is to be exonerated from such fault, because she had a pilot on board charged with her navigation, even if she would be exonerated from a fault in her navigation caused directly by the pilot. If the presence of a pilot is to exonerate the vessel from the fault of not having a proper lookout, it is difficult to see why it would not exonerate her from the fault of not having her reversing machinery in proper order. Yet, to hold the vessel not responsible for the latter fault, when under charge, as to her navigation, of a regular pilot, would be a violation of all principle. I do not understand that the English rule, which relieves a vessel from responsibility for her navigation while she is under the charge of a pilot, extends any further than to relieve her from the consequences of a fault directly attributable to the bad management or negligence of the pilot. But, however that may be, the law is settled for this Court, (*Walsh v. The China*, U. S. Circuit Court, July, 1866), that a vessel is responsible for the negligence or unskillfulness of a licensed pilot, whose services she is by law bound to accept.

The rules of navigation are now so well settled, and in most cases by positive statute, so far at least as vessels owned by citizens of the United States are concerned, that there can be no excuse for their wilful and deliberate violation. The necessity, especially in the case of a steam vessel, of having a proper lookout, properly stationed and actually and vigilantly employed in his duty, and of having, properly set and burning, the lights required by statute, has been enforced by the Courts of Admiralty of the United States so uniformly, that it must now be accepted as settled, that

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The Bark Merrimac.

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wherever the want of a proper lookout, or the want of proper lights, is shown, it will be for the vessel which has not the lookout or the lights to show that any collision which occurs is not in any way attributable to the absence of the lookout or the lights, or she will be condemned in damages. Notwithstanding the serious admonitions which they have received from the Courts, large steam vessels are most glaringly remiss in regard to having a proper lookout, and small tugs pay no heed, while towing other vessels, to the statutory requirement making provision that they shall carry two bright white masthead lights vertically, in addition to their green and red side lights, so as to distinguish them from other steam vessels, and convey to other vessels the knowledge that they have vessels in tow. The interests of commerce require that these maritime rules should be strictly enforced.

It results, that there must be a decree condemning both the tug and the Alabama in damages, with a reference to a Commissioner to ascertain the amount of the damages to the libellant.

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OCTOBER, 1867.

## THE BARK MERRIMAC.

SEAMENS' WAGES.—FORFEITURE BY DESERTION.—FORM OF OATH TO  
WITNESS.

Where a sailor deserted from a vessel, before the voyage for which he was shipped was completed, and never afterwards made any attempt to return to his duty:

*Held*, That he had forfeited his wages then due, irrespective of the statute of July 20th, 1790.



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**The Bark Merrimac.**

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The libellant, a Chinaman, was offered as a witness in his own behalf, and was sworn in the usual way. Objection was made, on behalf of the claimants, that the oath thus taken was not binding upon him. The court directed the claimants to examine him on that point. He stated that he did not know the name of the book that he was sworn on, but that, if he should say anything that was not true, the court would punish him, and after he was dead he should "go down there," making an emphatic gesture downward with his hand:

*Held*, That a witness must be sworn in such a way as was binding on his conscience.

That the libellant might be examined on the oath which he had taken.

This was a libel by William A. Corning against the bark Merrimac, and David Marshall, her master, to recover wages, and the value of clothes alleged by the libellant to have been left on board of the vessel, to the amount of \$404. The defence set up was desertion.

The libellant testified, that he was sick at Havana, and left the vessel, taking his clothes with him, and that he went to the hospital, and, after being there some days, was put again on board of the vessel, and, after being on board of her a day or two, again left her, and did not return to her. He alleged ill treatment on board as the cause of this second leaving; but as to this his evidence was contradicted. He afterwards made his way to New York, and, finding the bark there, filed his libel.

On the trial of the cause, the libellant offered himself as a witness, and was sworn in the usual way. The claimant objected to this, on the ground that the libellant was a Chinaman, and that the ordinary oath upon the Bible was not binding upon him. The court directed the claimants to examine him on this point. The libellant, on examination, said, that he was a Chinaman, but had left China when he was fifteen years old; that he did not know the name of the book upon which he was sworn; that if he should tell anything that was not true, the court would punish him; and, on being asked if anything would happen to him after he was dead, if he did not tell the truth, he answered that he would "go down there," making an emphatic gesture downward with his hand.

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The Bark Merrimac.

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The court ruled that a witness must be sworn in such a way as was binding upon his conscience, and that the libellant, on this testimony of his, might be examined.

The libellant was then examined. The claimants put in evidence a deposition which he had given *de bene esse*, contradicting in some respects the evidence which he had given on the stand.

For libellant, *A. Nash*.

For claimants, *Benedict & Benedict*.

BLATCHFORD, J. This is a libel by a seaman to recover his wages and the value of certain clothing and other personal property. The libellant shipped at Boston, as cook and steward, on the 3d of January, 1866, at \$35 a month, for a voyage from Boston to Havana, and thence where the master might direct, and finally to a port of discharge in the United States, the voyage not to exceed six calendar months. He signed the proper shipping articles, containing the above particulars, at Boston. He joined the vessel on the day he shipped. She left Boston January 12th, and arrived at Havana February 2d, and left Havana again on the 1st of March. The libellant went to Havana in the vessel, discharging his duties, but he did not leave Havana in the vessel. The defence set up in the answer is, that the libellant deserted from the vessel at Havana, and thereby forfeited all his wages. This defence is, I think, proved. The clear weight of the evidence is, that the libellant left the vessel and her service at Havana on the 26th of February, not only without leave and against his duty, but with an intent not again to return to his duty. (*Cloutman v. Tunison*, 1 Sumner, 375). He never afterwards made any attempt to return to his duty. I place my decision on this ground, irrespective of the statutory forfeiture of wages insisted on under the fifth section of the Act of July 20th,

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The Ship Norway.

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1790, in connection with the entries in the log book. The libellant, in fact, deserted twice; once on the 11th of February, and once on the 26th. But one desertion, the second one, is set up in the answer, and, whatever circumstances attended the first desertion, as involving the question whether or not the illness of the libellant furnished a sufficient excuse for his leaving the vessel on the first occasion, his second leaving was a plain desertion, unrelieved by any mitigating circumstances. It was not induced by any ill treatment on the part of the master and officers. The evidence of the libellant himself is wholly unreliable. There are so many material contradictions between his testimony given orally at the trial, and his deposition taken *de bene esse* before the trial, as to show that he is entirely unworthy of credit.

As to the clothing and other articles which the libellant left on board of the vessel when he deserted, there is nothing shown to charge the vessel with liability for them, and there is no sufficient evidence that the master ever had any of them.

The libel must be dismissed.

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OCTOBER, 1867.

## THE SHIP NORWAY.

## REVIVING SUIT.—LACHES.—STAY OF PROCEEDINGS. .

Where a suit to recover for materials furnished to a vessel was commenced in September, 1857, and, in December, 1857, the cause being then at issue, the claimants procured an order for a commission to examine a witness, with a stay of proceedings till its return, and direct interrogatories were served in June, 1858, but no cross-interrogatories were ever served, and the commission was never sent, and the libellant died in May, 1859, and no further steps were taken by either party till October, 1867, when the libellant's executors applied to the court to be substituted as libellants, and to have the stay of proceedings set aside;

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The Ship Norway.

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*Held*, That, as no time was fixed by statute within which executors must apply to be substituted, no laches could be predicated of the mere lapse of time, and inasmuch as the claimants could have at any time compelled the executors to be substituted, the claimants were as open to the charge of laches as the libellant, and the application to substitute the executors must be granted.

That, as the delay had arisen apparently from the fact that both parties understood that the suit was not to be further prosecuted, and as the witness to be examined under the commission was material, and was now in the East Indies, and a commission to examine him could not be executed in less than a year, the claimants were entitled to a continuance of the stay.

The libel against Norway in this case was filed on the 29th of September, 1857, and a monition issued, under which the vessel was attached. She was bonded by the claimants, and their answer was put in on the 9th of November, 1857. The action was noticed for trial, and put on the calendar for the December Term, 1857. The claimants then procured an order for a commission to examine a witness, with a stay of proceedings until the return of the commission. That order and stay had never been vacated. Direct interrogatories to be attached to the commission were served on the proctor for the libellant on the 5th of June, 1858; but no cross interrogatories were served by the libellant, nor had the commission ever been sent. Nothing had been done in the suit since the service of the interrogatories. The libellant died on the 13th of May, 1859, leaving a will, which had been duly proved before the Surrogate of the city and county of New York, and on which letters testamentary had been issued to two executors named in the will, one of whom resided in the city of New York, and the other in the county of Westchester. The executors had duly qualified, and now applied to the court to be substituted as libellants in the suit, in place of the original libellant, and for an order vacating the stay of proceedings.

For the executors, *J. Van Vleck*.

For claimants, *Benedict & Benedict*.

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The Ship Norway.

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BLATCHFORD, J. The action is one founded on contract, being brought to recover the amount of certain materials alleged to have been furnished for the building of the vessel. The cause of action, if there was any, therefore survived the libellant. Under such circumstances, the right of the executors to have the suit continued in their names is one conferred by statute. (*Act of September 24th, 1789, § 31, 1 U. S. Stat. at Large, 90*). No period of time is prescribed by the statute within which they must come in voluntarily and apply to be substituted. Therefore no laches can be predicated on the mere lapse of time. If the claimants desired the suit to proceed, they could, under the same statute, have at any time compelled the executors to come in within twenty days and be substituted. The provision of the statute is as follows: "Where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment, and the defendant or defendants are hereby obliged to answer thereto accordingly; and the court before whom such cause may be depending is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where such suit is depending, twenty days beforehand, shall neglect or refuse to become a party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party to the suit." So, also, the claimants had it in their power to secure the issuing of the commission, without

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any cross interrogatories, if the libellant was remiss in furnishing them. Therefore, so far as laches is concerned, the claimants are, in any point of view, as open to the charge as is the libellant. The motion to substitute the executors must, therefore, be allowed.

The motion to vacate the stay is denied. The executors have permitted so long a time to elapse before taking steps to revive the suit, because both parties seem to have understood that the cause would not be further prosecuted. And yet neither has done anything to turn himself, or the other party, or the cause, out of court. It appears that the witness, who was to be examined under the commission, is a material witness for the claimants, and now resides in the East Indies, and that the commission cannot be executed and returned in less than a year. Under the circumstances, I think that the claimants are entitled to a continuance of the stay.

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OCTOBER, 1867.

## IN THE MATTER OF SAMUEL M. LEVY AND MARK LEVY, BANKRUPTS.

### EXAMINATION OF BANKRUPT—ISSUES OF LAW AND REGISTER'S CERTIFICATES.

Under section twenty-six of the Bankruptcy Act and General Order No. 10, a bankrupt is to be examined and cross-examined like any other witness.

The exclusion by a register of a question in an examination before him, which is objected to, is not raising an issue of law within section four of the Bankruptcy Act, nor does objecting to the question raise such an issue of law.

A register has no right to pass upon the competency, materiality, or relevancy of a question.

The practice in taking depositions before a register is the established practice in examinations before an Examiner in Chancery.

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When a register adjourns a question into court under section four of the Act, it is not necessary to adjourn further proceedings in the matter until the question shall be decided by the judge.

As to the interpretation of the provision in section six of the Act with reference to certificates—*quere*.

A certificate by a register stating a question objected to, and that he excluded the question, is not a "special case" under section six.

In this case, on the examination of one of the bankrupts, the creditors and the assignee put the following question to him: "Have you acquired any property since you filed your petition, or since you were declared a bankrupt?" This question was objected to by the bankrupts, and the register sustained the objection, and excluded the question. Thereupon the creditors and the assignee excepted to the decision, and desired that it should be certified to the court for decision. The register stated his reason for excluding the question to be, that he is of opinion that, under the Bankruptcy Act, the assignee takes all the property acquired by a voluntary bankrupt up to the day on which the register signs the order, form No. 5, declaring and adjudging him to be a bankrupt.

When the creditors and the assignee had concluded the examination of the bankrupt, the counsel for the bankrupt proposed to cross-examine the bankrupt, and asked for an adjournment. The creditors and the assignee objected to such cross-examination, on the ground that the counsel for the bankrupt had no right to cross-examine him; that the right of the bankrupt was limited to explaining by affidavit, under General Order No. 33, any answers given by him; that his attention might be called by his counsel to any answer given by him, and he might be asked if he had any explanation to make; that his petition and schedules were his direct examination, and his examination by creditors was a cross-examination; and that he was his own witness and not a witness called by the creditors. The reply on the part

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of the bankrupt to these views was, that the most proper and convenient mode of calling the bankrupt's attention to any erroneous statement he might have made during his examination was by questions put by his counsel in the way of cross-examination; that in this way he was afforded an opportunity of correcting or explaining statements made by him; that, under General Order No. 33, he might correct his statements under oath, but was not confined to doing so in the form of an affidavit; that the particular way of doing so was in the discretion of the court; and that the examination of the bankrupt by a creditor, was not a cross-examination, especially as to any new matter inquired of, not contained in the petition and schedules, and particularly as regarded his copetitioner, the defeating of whose discharge, as well as that of the bankrupt examined, was alleged to be aimed at by questions propounded on the examination. The register certified both of the questions to the court, for its decision.

BLATCHFORD, J. I shall consider the last question first. Under section twenty-six of the Bankruptcy Act and General Order No. 10, I think that the bankrupt is to be examined and cross-examined like any other witness. Section twenty-six, after providing that the bankrupt may be required to attend and submit to an examination on oath, says, that "the court may, in like manner, require the attendance of any *other person as a witness*," and that, "for good cause shown, the wife of any bankrupt may be required to attend before the court, to the end that she may be examined *as a witness*." Form No. 45 is prescribed as a form to be used indifferently as an order for the examination either of the bankrupt or of his wife. Form No. 46 is prescribed as a form to be used as a caption to the examination of the bankrupt or of any witness. Form No. 47 is prescribed as a form of oath to be taken, on such examination, by the bankrupt



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or his wife. General Order No. 10 provides for the manner of conducting the examination of witnesses before a register, and says, that "the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode adopted in courts of law." It then prescribes that the depositions shall be taken in narrative form, except in special cases, and shall be read over to the witness and signed in the presence of the register. It then provides, that "any question or questions which shall be objected to shall be noted by the register upon the depositions, but he shall not have the power to decide on the competency, materiality, or relevancy of the question, and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just." Now, if General Order No. 10 does not apply to the examination of the bankrupt, then there is no General Order that does apply to his examination, and it is left to be regulated merely by the statute. If the bankrupt is to be regarded as a witness, then General Order No. 10 does apply to him, and expressly provides that he shall be subject to examination and cross-examination. That General Order speaks of the testimony given on the examination of witnesses as "depositions." Section 47 of the Act, in its list of fees to registers, says: "For taking depositions, the fees now allowed by law." The only fees allowed by law for taking depositions are those prescribed by the Act of February 26th, 1853, (10 *U. S. Stat. at Large*, 167,) as fees to commissioners for taking and certifying the depositions of witnesses. So that, unless the bankrupt is to be regarded as a witness, and unless his deposition is the deposition of a witness, no fee is given for taking his deposition. Everything in the Act and in the General Orders tends to the conclusion, that Congress and the framers of the General Orders intended that, at least so far as the manner of examining the bankrupt and taking his deposition is

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concerned, the proceeding should be conducted like the examination of any other witness, and the bankrupt be examined by direct and cross-examination. Whether, so far as the effect of his testimony is concerned, the bankrupt is to be considered as a witness called by the creditor or the assignee, or as a witness for himself under cross-examination by the creditor or the assignee, or not at all as a witness, but as a bankrupt under examination under the special authority of section twenty-six of the Act, is another and a different question, and one which will be disposed of when it is properly raised.

There is nothing in General Order No. 33 that conflicts with this view. When the examination and cross-examination of the bankrupt before the register are completed, and the deposition is signed by him and filed as required by section twenty-six, the whole document is "his examination;" and General Order No. 33, in saying that, "in like manner, he may correct any statement made during the course of his examination," means, that he shall have, in regard to statements made by him during the course of his examination, the same opportunity of correcting those statements that he has of supplying omissions in the schedules to his petition. This latter right is expressly given to him by section 26, which says, that he shall "be at liberty, from time to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts." The facts and the truth are what the law aims at, and the bankrupt is not to suffer because he has made an honest mistake in his schedules. Therefore, General Order No. 7 provides, that "the court may allow amendments to be made in the petition and schedules, upon the application of the petitioner, upon proper cause shown, at any time prior to the discharge of the bankrupt;" and General Order No. 33 provides that, "in making any application for amendment to the schedules, the debtor shall state, under oath, the substance of the matters proposed

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to be included in the amendment, and the reasons why the same had not been incorporated in his schedules as originally filed or as previously amended." So, also, by General Order No. 33, with a view to the ascertainment of the truth, and in order that the bankrupt may relieve himself from the imputation of having willfully sworn falsely in his examination in relation to any material fact, which charge is made a ground, by section twenty-nine, for withholding his discharge, he is permitted, on stating under oath the substance of the correction he desires to make, and the reason why it was not stated during his examination, to correct any statement made during the course of his examination, on making a proper application to the court for leave to make such correction. That is the meaning of the words "in like manner," in General Order No. 33, and that, and nothing else, is the purport and scope of that order, so far as it relates to the bankrupt's examination.

The question thus decided was properly certified as an issue of law, under section four of the Act. But the other question certified is not an issue of fact or of law which can be certified under section four. The question certified is, whether the question put to the bankrupt—"Have you acquired any property since you filed your petition, or since you were declared a bankrupt?"—was a proper question. The question certified is certainly not an issue of fact, and there are several reasons why it is not an issue of law.

(1.) The certificate of the register merely states that the question was objected to by the bankrupt, and that the register sustained the objection, and excluded the question. This is not raising an issue of law, within section four. The ground of objection to every question objected to should be stated, otherwise, no point, or question, or issue in regard to it, is presented or raised.

(2.) By General Order No. 10, the register had no right to decide on the competency, materiality, or rele-

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vancy of the question. He is required, by that order, to note the objection upon the deposition—that is, not merely the fact of objection, but the ground of objection ; and, if no ground of objection is assigned, he is not bound to note the fact of objection ; and the ground of objection must be directed to the competency, materiality or relevancy of the question. But he is not allowed to make any decision thereon. Therefore, no issue of law can be raised on his decision, nor can the propriety of such decision be certified as an issue of law, under section four. The question, therefore, whether the register was right in sustaining the objection to the question, and in excluding it, is not properly certified as an issue of law, under section four.

(3.) Under General Order No. 10, a question put to a bankrupt or other witness, on an examination before a register, and objected to in proper form, does not raise a question or issue of law which can be adjourned into court, under section four, for decision by the Judge. The manifest intention of that Order is, that, when a question is objected to, the question and the fact and grounds of objection shall be taken down by the register, and that the question, although incompetent, immaterial or irrelevant, shall be answered, and that, when the deposition is closed, the court shall deal with it as a whole, and then pass upon the question as to what parts of it are incompetent, immaterial or irrelevant, and impose costs, in its discretion, upon the party who caused the taking of the parts which ought not to have been taken. The language of the Order is: "Any question or questions which may be objected to, shall be noted by the register upon the deposition, but he shall not have power to decide on the competency, materiality or relevancy of the question ; and the court shall have power to deal with the costs of incompetent, immaterial or irrelevant depositions as may be just." Now, inasmuch as, by section four, it is made the duty of the regis-

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ter to adjourn into court, for decision by the Judge, any question or issue of fact or of law that is raised and contested by any party in the course of the proceedings, if the making of an objection to a question put to a witness, in the course of his examination, raises an issue of law, which the register is obliged to adjourn into court, under section four, so that it may be decided by the Judge, there will be left on the record of the examination no questions objected to and undisposed of, and no objections noted and undecided by the court, and there can be no incompetent, immaterial or irrelevant depositions or parts of depositions to be dealt with in regard to costs; every objection will be adjourned into court as an issue of law, and disposed of as it arises, and no incompetent, immaterial or irrelevant answer or testimony will be found in the record, for, the court will already either have excluded the answer to the question objected to, by deciding the question to be incompetent, immaterial or irrelevant, or else have admitted the testimony as competent, material and relevant. For the good sense of General Order No. 10 is, that it extends not only to objections to questions, but also to objections to answers and testimony, on the grounds of competency, materiality and relevancy, and that neither question, nor answer, nor testimony, is to be ultimately held to be incompetent, immaterial or irrelevant, unless objected to on the record for some ground of incompetency, immateriality or irrelevancy stated on the record. The practice thus prescribed for taking depositions, where the officer taking them notes the objections made to questions and answers, but has no power to decide on the competency, materiality or relevancy of any question or answer, is the established practice in examinations before an Examiner in Chancery, and in some other examinations; and no practical difficulty or embarrassment is experienced in the working of such a system. Although the meaning of the provision of section four of

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the Act, that the register shall *adjourn* the question or issue into court for decision by the Judge, is not that he shall necessarily adjourn the further proceedings in the matter until the question or issue raised and contested shall be decided by the Judge, (General Order No. 11, providing that the pendency of an issue undecided before a Judge shall not necessarily suspend or delay other proceedings before the register in the case, and the word *adjourn* in the section having the signification merely of the word *certify*, or *transmit*,) yet I am satisfied that, to hold that every objection to a question put on an examination of the bankrupt, or of any other witness, before a register, raises a question or issue of law, which, under section four of the Act, *must* be certified to the court for decision as soon as it arises, would soon break down, not only the system, but the court. For, although the pendency of the issue undecided before the Judge would not, under General Order No. 11, necessarily suspend or delay other proceedings before the register in the case, and although the examination of the bankrupt or other witness might proceed in respect to questions or answers not objected to, yet it could hardly be pretended that, under such a system, it would be proper to close the examination until the decision of the court had been had upon all the questions and issues thus raised. This would open the door to a protraction of the examination and of the case until human patience would be wearied out, and the bankruptcy system would be valueless alike to creditor and debtor, to say nothing of the increased expense caused to both. In regard to the hardship urged, of obliging the bankrupt or other witness to disclose, under irrelevant, immaterial, incompetent, inquisitorial, and other questions, the offspring of a mere itching and prurient curiosity, things which he ought to be protected from being compelled to answer, the same hardship exists in regard to the examinations before an Examiner in Chancery, and the other kindred examina-

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tions before referred to. And the bankrupt or other witness always has it in his power, in a clear case of abuse, to refuse, under the advice and responsibility of his counsel, to answer a question. Then, on an application to punish the party for a contempt, which must come before the court, and which the register has, under section four of the Act, no power to entertain, the whole question as to the competency, relevancy and materiality of the question will come before the court, in a proper way, for adjudication. Responsible counsel will not advise a party to refuse to answer a question, except in a reasonably clear case of abuse, and a party will not be likely to run the hazard of a contempt of court, in refusing to answer a question, unless advised by counsel to refuse. In this way, real and substantial questions alone will come before the court for adjudication, whereas, under the facility with which an objection can be made to a question or answer, and the irresponsibility for making it, except as regards the mere penalty of costs, the court would probably find itself able to do little other business than to dispose of objections to single questions and answers, one at a time, certified by registers, on examinations before them.

For these reasons, I am satisfied that a question put to a bankrupt or other witness, on an examination before a register, or an answer given by him, even though objected to in proper form, does not raise a question or issue of law which can be adjourned into court, under section four of the Act, for decision by the Judge.

Inasmuch as the first question certified in this case by the register is not properly adjournable into court for decision by the Judge, under section four, it remains to be considered whether it is properly before the court under section six of the Act.

Section six provides for two modes of bringing a question before the court. The first mode provided is, that "any party shall, during the proceed-

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ings before a register, be at liberty to take the opinion of the District Judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the Judge, who shall sign the same if he approve thereof, and such certificate so signed shall be binding on all the parties to the proceeding ; but every such certificate may be discharged or varied by the Judge, at chambers or in open court." This provision is very difficult of satisfactory interpretation, and of practical execution. It is not stated what the Judge shall do if he does not approve "thereof," and it is only the certificate to be signed by the Judge, if he does approve "thereof," which is made binding on all the parties to the proceeding. The opinion of the Judge, so to be taken, is not declared to be binding on the parties, unless the Judge approves of and signs the certificate. In the present case, in regard to the first question so certified, I am of opinion that the question put to the witness, and excluded by the register, was not a proper question to be put, but I am also of opinion that the register had no power to decide on the competency, materiality or relevancy of the question, and was, therefore, wrong in excluding it ; and I am also of opinion that the view of the register, that, under the Bankruptcy Act, the assignee takes all the property acquired by a voluntary bankrupt up to the day on which the register signs the order, Form No. 5, declaring and adjudging him to be a bankrupt, is not a correct view ; and I am also of opinion that the reasons given by the register, in his certificate, for holding that the objection to the question put was a good objection, are not sound. I, therefore, cannot say that I approve the certificate, within the language of section six. My opinion upon the point or matter on which my opinion is desired by the certificate, has been given, but of what avail it is, or how far it is binding on the parties, under section six of the Act, is something I am not now called on to decide.



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Judge Hall, of the Northern District of New York, has made a rule of his court (Rule 24) in regard to this certificate under section six, as follows: "In every certificate made by a register, stating any case, point or matter for the opinion of the District Judge, under the fourth or sixth section of the Bankrupt Act, according to form No. 50, established by the General Orders in Bankruptcy, the fact, agreed upon by the parties to the controversy, shall be clearly and fully stated, with reasonable certainty of time and place; and this shall be followed by a brief statement of the claim made, or position assumed, by each of the parties to the controversy. The register shall then add thereto such proposed order, adjudication or decision as in his judgment ought to be made, and which shall be in such form that the District Judge may signify his approval thereof by his signature. The register shall then afford to each of the opposing parties, or their attorneys, a reasonable opportunity to consent, in writing, to the register's decision thereon. The court will, on the approval and confirmation of such decision by the register, make such order for costs, against any party declining to assent thereto, as may be deemed proper. In case all parties to such controversy shall assent to such adjudication or decision of the register, he shall file the same, and proceed with the case upon the basis thereof, as though such controversy had not arisen." This rule seems to imply that Judge Hall regards the opinion of the District Judge, in respect to any case, point or matter stated in the certificate of a register, under either the fourth or the sixth section of the Act, as to be given solely by his approving or disapproving the proposed order, adjudication or decision, which is to be added by the register to the certificate, his approval being signified by his signing the proposed order, adjudication or decision, and his disapproval being signified by his withholding his signature.

The second form, under section six, in which the

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opinion of the court can be obtained upon a question arising in the course of the proceedings, is, by a special case, stated by the parties by consent, and signed by them or their attorneys, and, when it presents an issue raised before the register in any proceedings, certified by the register, under General Order No. 11. The present certificate is not one of such a special case.

The question intended to be raised by the certificate, in this case, and which is discussed by the register, as to the time when the line is to be drawn between property which does and property which does not pass to the assignee in bankruptcy, is one of paramount importance, and is fully considered and disposed of by me in my decision in the matter of Charles G. Patterson, made herewith.

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OCTOBER, 1867.

## IN THE MATTER OF CHARLES G. PATTERSON, A BANKRUPT.

COMMENCEMENT OF BANKRUPTCY PROCEEDINGS.—TIME TO WHICH THE ASSIGNMENT RELATES.—ADJUDICATION.—AMENDMENT OF PETITION OR SCHEDULES.—BANKRUPT MAY CONSULT COUNSEL ON HIS EXAMINATION.

When a petition in bankruptcy is filed, which is followed by an adjudication of bankruptcy, the time of the filing of the petition is the commencement of proceedings in bankruptcy, and the assignment, when made, relates to that date.

The fact that amendments to the petition or the schedules attached are afterwards, by order of the register, filed before the adjudication, does not affect the date to which the assignment relates.

If no adjudication in bankruptcy is made upon a petition, no proceedings are commenced, so as to affect the title to the debtor's property, or to give a creditor any right against the debtor as a bankrupt, or against his property, except such as are provided by section forty.

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The words "may be issued," in section thirty-eight of the bankruptcy Act, are to be read, "shall be issued."

The adjudication of bankruptcy in a voluntary case ought not to be postponed until the register has, in accordance with General Order No. 7 and rule 4 of this court, certified the petition and schedules to be correct.

The words "adjudication of bankruptcy," in sections fourteen and nineteen of the Act, mean the commencement of the proceedings, according to section thirty-eight.

The register is the proper judge of the propriety of allowing a bankrupt, who is under examination, the privilege of consulting with his counsel, provided that such consultation does not cause delay in the proceedings; and the court will not interfere with the exercise of such discretion, in ordinary cases.

BLATCHFORD, J. This is a special case stated for the opinion of the court in this matter under section six of the Act. It is signed by the attorneys for the bankrupt, and the attorneys for Tupper & Beattie, creditors, who have proved their debt; and it is certified by the register, under General Order No. 11, to contain questions raised before him in the proceedings in this matter.

The examination of the bankrupt was proceeding before the register, and the bankrupt testified that he received a sum of \$5,000 about the 25th of August, 1867, which he then borrowed from one Charles Kirby, and which he had not repaid. Thereupon the creditors asked him this question: "Where is it?" The question was objected to by the bankrupt, and the register overruled the objection. The bankrupt answered: "It has been mostly spent—used." He was then asked: "How much of it has been spent?" To this question the bankrupt objected, on the ground that, as matter of law, the examining creditors had no right to inquire of the bankrupt as to any property in his possession, which was acquired after the commencement of the proceedings in bankruptcy under which his examination was had, and that, if they had that right, it was exhausted by previous interrogatories put and answered. The bankrupt then requested the register to adjourn the question into court, as an issue of law, to be decided by the judge, under sec-

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tion four of the Act. The register declined to adjourn the question into court, and decided that the question should be answered. It is agreed that the records and files in the case are a part of the special case. It is also agreed that the following questions are presented to the court: (1.) Was the register correct in declining to adjourn the question into court, as an issue of law? (2.) Were the questions above set forth admissible?

For the reasons set forth in my decision made herewith, in the matter of Samuel M. Levy and Mark Levy, I hold that the register was correct in declining to adjourn the question into court as an issue of law.

A decision on the second question presented by the special case involves a decision as to the time when the line is to be drawn, between property which does, and property which does not, pass to the assignee in bankruptcy.

In the present case, the chronology of the case is as follows: On the 25th of June, 1867, a petition, with schedules, was filed. On the 27th of June the register examined the same and found them deficient. Proceedings were adjourned from time to time until the 8th of August, on which day the register, on the application of the petitioner, duly verified, made an order that he have leave to file amended schedules, A and B, to his petition, by filing and substituting new and complete schedules. On the 19th of August, new and complete schedules, A and B, comprising the whole eleven of the sheets composing schedules A and B in form No. 1, were filed, accompanied by oaths to the new schedules; but no new petition was filed, nor any amendment to the petition. On the 6th of September the register examined the substituted schedules, and certified the same to be incorrect in form and deficient. On the 10th of September, the register made an order giving leave to the petitioner to file amendments to his substituted schedules. On the 11th of September, the petitioner filed an amendment to

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schedule A, No. 2, and one to schedule A, No. 3, duly verified. On the 12th of September, the register examined the petition and schedules, and certified the same, as amended, to be correct, and made adjudication of bankruptcy, and granted a certificate of protection. On the 13th of September, the register issued a warrant to the marshal, returnable October 23d. On the 23d of September, the proof of debt by Tupper & Beattie for \$7,952.66 was received and filed by the register. On the 25th of September the register, on the application of Tupper & Beattie, made an order, returnable October 9th, for the examination of the bankrupt. This order fell through for want of service, and another order was made, returnable October 15th, under which the bankrupt attended before the register on that day, and his examination has proceeded.

It thus appears that the petition was filed on the 25th of June, the money inquired about was borrowed and received by the bankrupt on the 25th of August, and the adjudication of bankruptcy was made on the 12th of September. An assignee was elected by the creditors on the 23d of October, at their first meeting, and his choice has been approved by the register and the judge, and he has accepted the trust.

It is insisted by the creditors that everything which was the property of the bankrupt on the 12th of September, at the time the adjudication of bankruptcy was made, passed to the assignee when he was appointed; and it is contended by the bankrupt that nothing passed to the assignee which became the property of the bankrupt after the 25th of June, when his petition was filed. If the latter view is the correct one, the questions in regard to the \$5,000 were improper. If the former view is the correct one, the questions were proper. The whole subject has been orally argued before me by the counsel for the respective parties.

The fourteenth section of the Act provides, that the

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In the Matter of Charles G. Patterson, a Bankrupt.

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assignment to be executed to the assignee shall "assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee." The intent and purport of this provision is, that the property which was the property of the bankrupt at the time of the commencement of the proceedings in bankruptcy, and no other property, shall vest in the assignee, and shall vest in him as of the time of the commencement of such proceedings, no matter when the assignment to the assignee is actually executed. It does not mean that the property which is the property of the bankrupt at the time the assignment is executed, and also the property which was his property at the time of the commencement of the proceedings, shall pass to the assignee. The whole clause must be read together, and, so read, the words "all the estate, real and personal, of the bankrupt" do not mean all that which is his estate at the time the assignment is executed, but they only mean all that which was his estate at the time of the commencement of the proceedings in bankruptcy. So, also, form No. 18, the form of the assignment, construed in connection with the statute, and purporting on its face, as it does, to be made by virtue of the authority conferred by the fourteenth section of the Act, conveys to the assignee only the property which was the property of the bankrupt at the time of the commencement of the proceedings in bankruptcy, and the blanks in it for a date are to be filled with the date of the day of the commencement of such proceedings. The word "is," in that form, before the word "possessed," is probably a misprint. The form is evidently copied almost *verbatim* from the form of assignment used under the Massachusetts insolvent law, and in that form the word

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In the Matter of Charles G. Patterson, a Bankrupt

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“was” is used, and not “is,” before the word “possessed.”

This brings up the question, What is the time of the commencement of proceedings in bankruptcy? The thirty-eighth section of the Act undertakes to determine this. It provides, “that the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, upon which an order may be issued by the court or by a register in the manner provided in section four, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this Act.” The order referred to in this provision must be one which can be issued by the court, and which can be also issued by a register, provided power is given to the register by section four to issue it; and it evidently must be the earliest order which can be so issued, and it must be an order which is common to voluntary and involuntary cases. It cannot mean the order of reference to a register, form No. 4, for that is confined to voluntary cases, and can never be made by the register, and there is no corresponding order in involuntary cases. It must mean the order adjudicating the debtor to be a bankrupt. This order, in voluntary cases, is form No. 5, and it is called an order, in a note to that form. It may be made by the court, and it may also be made by the register under section four. In involuntary cases this order is form No. 58, and is called an order on the face of it. It is called, in section forty-two, an “order of adjudication of bankruptcy.” It can be made by the court, but it cannot be made by a register, because section four of the Act, as interpreted by General Order No. 5, does not authorize a register to make it. The order of adjudication is the earliest order which answers the requirements of the statute. Besides, the good sense of the provision harmonizes with this view. Striking out the words “either by a debtor in his own behalf, or by any creditor against a debtor,” the provision reads, that

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“the filing of a *petition* for adjudication in bankruptcy, upon which an *order* may be issued by the court or by a register, &c.” The words “for adjudication in bankruptcy” are to be understood after the word “order,” in like manner as they are found after the word “petition.” The petition is filed for an adjudication. The order for an adjudication follows the filing of such a petition.

The next question is, as to what is the meaning of the words, “*may* be issued.” The word *may* must here be interpreted to mean *shall*. The filing of a petition, upon which an order of adjudication shall be issued, whether in a voluntary case or in an involuntary case, is the commencement of proceedings in bankruptcy. Unless the order of adjudication is made, the filing of the petition is not the commencement of proceedings. In a voluntary case, the petition may be filed, and, before the adjudication is made, the debtor may, for good reasons, have the proceedings stayed by the court, and they may never be resumed. In such case, no title of the debtor to any property can be affected, nor can any creditor acquire any rights, under the proceedings, for no proceedings will, in a legal sense, have been commenced. So, in an involuntary case, if, under section forty-one, on the return of the order to show cause, the allegations of the petition are not proved, no order of adjudication is made, and no proceedings have, in a legal sense, been commenced, so as to affect the title to the debtor's property, or to give any creditor any rights against the debtor as a bankrupt, or against his property, except the purely provisional rights and remedies provided by section forty. It requires, therefore, an order of adjudication to make the filing of a petition of any avail as a commencement of proceedings. But, when the order of adjudication is made, then the filing of the petition is the commencement of proceedings. By virtue of the making of the order of adjudication, the filing of the petition becomes the commencement of proceedings.



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The making of the order of adjudication relates back and gives an effect to the filing of the petition which it could not previously have, and that effect is, that the proceedings are to be considered as having been commenced when the petition was filed.

What is the petition, and what is its filing? By section eleven, the petition, in a voluntary case, is to contain certain averments, and is to have annexed to it a sworn schedule of debts and a sworn inventory of property; and it is declared that, if the debtor applies by such a petition, with such a schedule and such an inventory annexed, "the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt." In an involuntary case, by section thirty-nine, a petition by a creditor is provided for, and, by section forty, it is provided that, on the filing of the petition, an order shall be made for the debtor to show cause why the prayer of the petition should not be granted. No provision is made by the Act for the filing of more than one petition by the same debtor or the same creditor, in the same matter, or for more than one filing of such petition. The forty-second section provides that the order of adjudication of bankruptcy, in an involuntary case, shall require the bankrupt to give to the marshal a schedule of his creditors, and an inventory of his estate, in the form, and verified in the manner, required of a petitioning debtor. The twenty-sixth section provides, that the bankrupt shall "be at liberty, from time to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts." General Order No. 7 provides, that "the Court may allow amendments to be made in the petition and schedules upon the application of the petitioner, upon proper cause shown, at any time prior to the discharge of the bankrupt," and General Order No. 33 provides specially for the mode of making amendments to the schedules, annexed to the debtor's

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In the Matter of Charles G. Patterson, a Bankrupt.

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petition. All these provisions serve to show that the petition is filed once for all in any case; that, if it is amended, such amendment does not alter the date of its filing, or postpone the effective vigor of such filing to the time the amendment to it is filed; that the amending of the schedules does not affect or postpone the time of the filing of the petition; and that any petition or schedule that is amended is merely amended, leaving the original that is amended still to stand, so far as the question of jurisdiction or commencement of proceedings is concerned, in regard to the time when it was filed, as if it were not amended.

This being so, section eleven declares, that the filing of the petition "shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt." When such a voluntary petitioner as the eleventh section specifies declares, by petition to the proper court, his inability to pay his debts in full, and his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain the benefit of the Act, and annexes to his petition what purports to be the verified schedule and inventory required by the eleventh section, the filing of his petition is an act of bankruptcy, and he has a right to be adjudged a bankrupt immediately upon the filing of the petition, even though his petition and schedules may require amendment, and may afterwards be allowed to be amended. The adjudication of bankruptcy, in a voluntary case, ought not to be postponed until, under General Order No. 7 and Rule 4 of this court, the register has examined the petition and schedules, and certified them to be correct in form. In the present case, that practice seems to have been pursued, for the petition was filed on the 25th of June, and the adjudication of bankruptcy was postponed until the 12th of September, in order to allow the schedules to be made correct in form. No amendment was made to the petition.

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The forms for orders of adjudication support this view. Form No. 5, for a voluntary case, states that the register finds that the debtor "has become a bankrupt," and that the register thereby declares and adjudges him a bankrupt accordingly. He does not become a bankrupt *by* the adjudication, but he becomes one by the filing of the petition, provided the adjudication is afterwards made. The adjudication is merely a certificate or order, made by an authorized officer, to the effect that the petitioner became a bankrupt by the filing of his petition. Hence, in the title of the matter, in form No. 5, the date of the filing of the petition is set forth, and the adjudication is, in effect, a finding or order by the register that the petitioner became a bankrupt when his petition was filed, and that he is declared and adjudged to be such bankrupt. So, in an involuntary case, the adjudication, form No. 58, adjudges that the debtor became bankrupt before the filing of the petition, and, therefore, declares and adjudges him a bankrupt accordingly. In a voluntary case, he becomes a bankrupt when he files his petition. In an involuntary case, he becomes a bankrupt before the petition is filed against him. In the former case, the filing of the petition is the act of bankruptcy. In the latter case, some act committed before the filing of the creditor's petition was the act of bankruptcy. But, in both cases, the adjudication is nothing but a judicial finding of the fact, that the act of bankruptcy was committed at some period prior to the time the adjudication is made. When this finding is made, then it is legally adjudged, in the voluntary case, that the proceedings were commenced when the debtor's petition was filed, which filing was itself the act of bankruptcy; and, in the involuntary case, that the proceedings were commenced when the creditor's petition was filed, and not before, although the act of bankruptcy was committed before the filing of such petition.

There is nothing in General Order No. 7, or in rule

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In the Matter of Charles G. Patterson, a Bankrupt.

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4 of this court, that requires the register to certify the correctness of the petition and schedules before he makes adjudication of bankruptcy. Rule 4 of this court only requires the register to certify such correctness before he issues a warrant to the marshal.

The construction I have given to the Act makes all its provisions harmonious. The expression "adjudication of bankruptcy," where it occurs in section fourteen, means a judicial finding that the party became a bankrupt either by the filing of a debtor's petition or before the filing of a creditor's petition. Thus, the provision, in section fourteen, that all the property, rights, &c., of the bankrupt "shall, in virtue of the adjudication of bankruptcy and the appointment of the assignee, be at once vested in such assignee," means, that such property, rights, &c., shall, in virtue of the finding that the bankrupt had previously become a bankrupt and the appointment of the assignee, be at once vested in the assignee; but they vest as of the time of the filing of the petition. The expression, "time of the adjudication of bankruptcy," in sections fourteen and nineteen, means the time when, by the adjudication, the proceedings in bankruptcy were commenced, according to section thirty-eight. Thus, under section fourteen, the assignee is to be substituted for the bankrupt, in suits "pending at the time of the adjudication of bankruptcy," that is, pending at the time the proceedings were commenced, according to section thirty-eight. Section sixteen provides, that if, "at the time of the commencement of the proceedings in bankruptcy," an action is pending by the debtor for anything which ought to pass to the assignee, the latter may be admitted to prosecute it in his own name. Section nineteen, in saying that "all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day," "may be proved against the estate of the bankrupt," means, that all debts due and payable

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In the Matter of Charles G. Patterson, a Bankrupt.

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at the time of the commencement of the proceedings, as above defined, may be proved. The same section afterwards provides, that any person liable as bail, &c., for the bankrupt, who shall have paid the debt, shall be entitled to prove such debt, "although such payments shall have been made after the proceedings in bankruptcy were commenced." This implies clearly that, but for this provision, inasmuch as the payments were not made till after the proceedings were commenced, the claim, not being a debt when the proceedings were commenced, could not be proved, and shows that, under the previous part of the section, a debt to be provable must be due, or must exist as a debt, and not as a mere suretyship, at the time the proceedings are commenced; for, if the payments were made after the commencement of the proceedings and before the making of the adjudication, they could, under the previous part of the section, be proved as a debt, if that previous part means that debts which come into existence as such as late as the making of the adjudication can be proved.

We then come to the discharge. Section thirty-two gives the form of the discharge *in haec verba*. It discharges the bankrupt from all provable debts which existed on the day (naming it) on which the petition for adjudication was filed by or against him, excepting such debts, if any, as are excepted by the Act from the operation of a discharge. The language of the discharge is too plain for comment. There is but one petition, in judgment of law, in a given case, and but one filing of it.

This makes a harmonious system. When an adjudication of bankruptcy is made, following the filing of a petition, then it is judicially established that the proceedings in the case commenced when the petition was filed. The date of such filing then becomes the date from which the assignee takes all the property of the bankrupt which was his property at that date; but the assignee does not take anything which became the property of the bank-

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In the Matter of Charles G. Patterson, a Bankrupt.

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rupt after that date. Such date also becomes the date at which a debt must be due or exist, in order to be provable, subject to the special provisions of section nineteen in regard to contingent liabilities. Such date also becomes the date at which provable debts must have existed, in order to be discharged by the discharge. In other words, the date of the filing of the petition by or against a debtor is the date at which, if an adjudication of bankruptcy follows, the old order of things passes away and a new leaf is turned over. Any other construction would work injustice either to the bankrupt or to his creditors. As he can be discharged only from debts which existed on the day the petition was filed, it would be wrong to give to the creditors holding those debts property acquired by him after that day, and thus take it away from the bankrupt, or from creditors whose debts, because not in existence on that day, cannot be proved against him under his bankruptcy.

It follows, therefore, that, in the present case, nothing passed to the assignee which became the property of the bankrupt after the 25th of June, and that the questions in regard to the \$5,000 were improper if that money was not the property of the bankrupt when his petition was filed.

For the bankrupt, *B. Sanford*.

For the creditors, *Benedict & Benedict*.

On the further examination of the bankrupt, he requested of the register the privilege of consulting his counsel as to his answers to interrogatories. The register granted the request, "provided that such consultation does not delay the proceedings." On the request of the counsel for the creditors, the register certified the matter to the court.

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The Ship Antelope.

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BLATCHFORD, J. Within the limits stated by the register, that is, to the extent of allowing to the bankrupt the privilege of consulting with his counsel while under examination, provided that such consultation does not cause delay in the proceedings, the register is the proper judge of the propriety of allowing to the bankrupt such privilege, and the court will not interfere with the exercise of such discretion, in ordinary cases.

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## Eastern District of New York.

OCTOBER, 1867.

### THE SHIP ANTELOPE.

ADMIRALTY PRACTICE.—BONDING A VESSEL WORTH LESS THAN SEVERAL CLAIMS AGAINST HER.—MARRIED WOMEN REJECTED AS SURETIES.

Where several libels were filed against a vessel to recover claims, which amounted to more than the appraised value of the vessel,

*Held*, that she might be discharged, on the claimants giving a stipulation, in the full value of the vessel, the same to stand in court, for the benefit of all the libellants before the court.

That a married woman, though she justified in the required amount, would not be accepted as surety.

The ship Antelope was held under process in two cases, and both cases came before the court upon a motion made on behalf of the claimants, for the release of the vessel upon bail.

It appeared that, on the 31st day of August, 1867, one George W. Curtis filed his libel against the vessel to enforce a lien, amounting to \$827.22, for supplies fur-

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The Ship *Antelope*.

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nished the vessel in this port between the 19th day of June and the 30th of August last. The vessel was, at that time, in the custody of the sheriff, under process issuing out of a State court, and the execution of the process of this court was, accordingly, delayed until the custody of the sheriff terminated by a sale and delivery to the persons now before the court as claimants, when the vessel was duly seized by the marshal, under the process issued in the action of Curtis, and also under process issued in a subsequent action instituted against the same vessel by the libellant, Franklin F. Randolph, to recover the sum of \$23,000, claimed to be due by reason of a breach of a charter party, which occurred in this port at about the same time. The total value of the vessel, as ascertained by an appraisement, to which no objection was taken, was \$18,000, a sum insufficient to discharge in full the claims made against her in the two actions above mentioned. The claimants, having perfected their appearance, now moved for the release of the vessel, upon the filing of a stipulation in the full value of the vessel, the same to stand in court in place of the vessel for the benefit of all the libellants before the court, and conditioned to abide by and perform the decrees of the court in such actions, and pay the sums awarded therein, not exceeding in all the appraised value of the vessel.

For Curtis, *Beebe, Dean and Donohue.*

For Randolph, *Scudder and Carter.*

For Claimants, *Emerson and Goodrich.*

BENEDICT, J. Inasmuch as the value of this vessel is conceded to be less than the amount claimed in these actions, it is manifest that the claimant will, by stipulating to pay the decree in each case to the extent of the



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The Ship *Antelope*.

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value of the vessel, render himself liable to pay into court, upon his stipulations in the two cases, more than the value of the property which he will receive upon the release. Unless, then, some form of stipulation can be taken which will render the claimant liable for no more than the value of the property which he receives from the marshal, the vessel must remain in custody. According to the view taken by the libellants, the necessary effect of admiralty proceedings against a vessel, under circumstances like the present, is to compel the ship-owner either to permit his vessel to be taken from him and sold before any liability on her part has been ascertained, or to allow her to remain tied to the wharf in custody of the marshal until the final termination of the litigation in this or the appellate court, or to pay a demand which he disputes. But the flexible proceedings of the admiralty cannot be supposed to be inadequate to such a state of facts, and the court powerless to prevent such an effect of its process. To relieve a ship-owner from such a dilemma, by a stipulation in the form here proposed, is as clearly within the general powers of a Court of Admiralty as the power to release upon a stipulation in the ordinary form. It is a power necessary to the proper exercise of the extraordinary jurisdiction over a ship and her owners, which belongs to this court, and the same reason which impels the court to take the ordinary stipulation is applicable in favor of the stipulation in the form proposed. A Court of Admiralty will always release a ship, and enable her to proceed to earn freight, when the rights of parties having claims upon her can be properly protected by a stipulation taken in place of the vessel. The stipulation here offered will fully secure to the libellants all the rights which they now have. Their proceedings look to a sale of the vessel, in satisfaction of the claims set forth. If the vessel were to be sold upon final decrees, or as perishable, only her value would be paid into the registry, no

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The Ship Antelope.

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matter how many claims were outstanding against her, and the lien of each libellant would be then transferred to the fund in court, leaving the vessel free from all liens. Under the stipulation proposed, the same sum will be paid in, and with this difference in favor of the libellants, that, by the terms of the stipulation offered, the amount so paid in will be applicable to the payment of the claims of the present libellants before the court; whereas, in case of a sale, the proceeds might be subjected to subsequent and additional claims. While the stipulation proposed will thus secure to the libellants the payment of their demands, it will cause no inconvenience in the prosecution of the suits. The proceeding is, in effect, a consolidation of the two causes for the purpose of bonding, to avoid the loss and expense which must otherwise be sustained; and the causes could properly be formally consolidated for this purpose, and might well remain consolidated, if either libellant desires to contest the validity or amount of the demand made by the other, to be dissevered whenever it shall be needful for the sake of convenience or in furtherance of justice. (*The Wm. Hutt*, 1 *Lush.*, 25.) In all cases of many libels against a vessel, where the proceeds in court are insufficient to pay all, the causes are, in effect, consolidated: that is, no one is heard without notice to all, and the rights and priorities of all are disposed of at one and the same time, each libel being generally considered as an answer to all other libels, when the question is simply one of priority. (*The brig Magoun*, *Olcott*, p. 66.) It is not seen why the same practice cannot as well be pursued where, instead of proceeds, there is a stipulation for the benefit of all. (*See The Rodney*, *Blatch. and How.*, p. 227.) As to the objection founded upon the eleventh rule of the Supreme Court, it seems sufficient to say that that rule is not intended to apply to a case of several libels against a vessel which is insufficient to pay all; and no rule of the Supreme Court applying to the case,

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The Ship Antelope.

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it must be governed by "the principles, rules and usages which belong to Courts of Admiralty, as contradistinguished from Courts of Common Law." (*The Delaware, Olcott*, p. 242.) Moreover if the eleventh rule were to be deemed applicable to a case like this, the power which the rule confers upon the court to fix the amount of the stipulation, without regard to the value of the vessel, would include the power to limit the liability of the stipulation as proposed here. The motion of the claimants will, therefore, be granted, and the vessel will be released upon the claimants filing a stipulation to the effect above indicated. The form of the stipulation may be settled before the court, if necessary, and it must contain a provision for interest. In this court, all persons desiring to recover property upon stipulations are required to include in their stipulations a provision for interest on the value of the property, from the time of its receipt.

The claimants presented, as surety on the bond directed to be given as above, a married woman, who justified in the required amount. The libellants objected to taking a bond thus executed, and, on referring the matter to the Judge, the surety was rejected, and the claimants were ordered to furnish other surety.

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In the Matter of the American Waterproof Cloth Company, a Bankrupt.

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OCTOBER, 1867.

IN THE MATTER OF THE AMERICAN WATER-  
PROOF CLOTH COMPANY, A BANKRUPT.

APPOINTMENT OF TRUSTEES BY CREDITORS. — PRACTICE ON MOVING  
CONFIRMATION.

Where creditors of a bankrupt had adopted a resolution appointing trustees under section forty-three of the Bankruptcy Act, the confirmation of which was opposed ;

*Held*, That the parties desiring the confirmation of the resolution were the moving parties, and should serve their papers on the opposing parties that they might answer them.

In this case, the creditors had adopted a resolution, under section forty-three of the Bankrupt Act, appointing trustees, and the matter of confirming the resolution came up before the court. Some of the parties interested contested the confirmation of the resolution, and the question of the practice in such a case was discussed.

Judge Benedict held that the parties desiring the confirmation of the resolution should be considered the moving parties, and directed that they should, within a week, file and serve such papers as they saw fit in support of their motion, and that the opposing parties have two weeks to file and serve papers in opposition thereto.

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In the Matter of Jeremiah G. Wilbur, a Bankrupt.

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NOVEMBER, 1867.

IN THE MATTER OF JEREMIAH G. WILBUR,  
A BANKRUPT.INJUNCTION.—RIGHTS OF JUDGMENT CREDITORS WHO HAVE OBTAINED  
A LEVY PRIOR TO THE FILING OF THE BANKRUPT'S PETITION.

Where judgments were obtained in good faith against a bankrupt, and levies, on executions issued under them, were made prior to the filing of his petition in bankruptcy, after which injunctions were granted by the Bankruptcy Court, which, after the lapse of several months, the creditors moved to dissolve, the assignee in bankruptcy having taken no steps in the matter;

*Held*, That as it did not appear that the property levied upon was worth more than the amount of the judgments, nor that a sale by the assignee would realize any more than a sale by the sheriff, and as there was no proof that any advantage would result to any creditor by continuing the injunction, it must be dissolved.

That the rights acquired by the judgment creditors by their levy must be preserved to them.

Whether the Bankruptcy Court has power to assume possession and control of property levied on by a sheriff prior to the proceedings in bankruptcy—*quere*.

This was a motion made in behalf of certain judgment creditors of the above-named bankrupt, for the dissolution of an injunction previously issued by this court restraining them from proceeding to collect upon execution the amount of certain judgments which they had obtained in a State court, and upon which execution had been issued and a levy made upon certain personal property prior to the filing of the bankrupt's petition.

BENEDICT, J. It is clear, upon principle, and also, as I think, from the general scope of the provisions of the Bankrupt Act, that any rights which these judgment creditors have acquired in the personal property in question, by reason of their levy made prior to the filing of

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In the Matter of Jeremiah G. Wilbur, a Bankrupt.

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the bankrupt's petition, are to be preserved to them, and cannot be destroyed by the subsequent proceedings in bankruptcy. Whether, in any case, this court has the power, by virtue of any provision in the Act, to assume the possession and control of the property levied upon by a sheriff prior to the proceedings in bankruptcy, and compel the judgment creditors to receive their debt at the hands of this court out of the proceeds realized from a sale of such property to the assignee in bankruptcy, is a question not free from difficulty. But, if such a power exists, it is to be exercised with caution, and not to be resorted to unless it appear necessary to protect some substantial right or prevent injustice. As this case appears from the papers, no advantage will be derived from the interfering with the proceedings upon the execution in the hands of the sheriff. It is not claimed by the assignee that the property levied upon exceeds in value the amount of the judgments, nor that a sale of it by the assignee will realize any greater sum than a sale by the sheriff. Although the injunction was granted in July, and the assignee appointed September 3d, it does not appear that the assignee has made any demand upon the sheriff for the property, or taken any steps towards securing possession of it; nor has any application been made by him for leave to discharge the levy by payment of the amount due upon the judgments, while it is conceded that the judgments were obtained in good faith, without fraud or collusion. Upon such a state of facts, and in the absence of evidence of any advantage to result to any creditor from the interference of this court by a continuance of the injunction, I have no hesitation in directing it to be dissolved.

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The Steamer City of Paris.

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NOVEMBER, 1867.

## THE STEAMER CITY OF PARIS.

## COLLISION.—APPLICATION BY INSURERS TO BE MADE CO-LIBELLANTS.

Where a libel was filed by the owners of a schooner, which was sunk in a collision, to recover for her loss, and contained the allegation that it was filed "in behalf of the libellants and all parties having a common right of action arising out of the collision, who may intervene as co-libellants, or otherwise"; and, after a decree for libellants, and while the reference to ascertain the damages was pending, insurers, who had paid a loss on the cargo, applied to the court on petition to be made co-libellants;

*Held*, That, as no injustice would be caused to the claimants, the application would be granted, although the court saw no necessity for, or advantage in, the proceeding.

That a special reference must be had, to take and report to the court the evidence produced by the petitioners to show their right to participate in the decree, and any evidence in opposition.

This case came before the court upon a petition presented under the following circumstances: The libel was filed by Henry P. Simmons and other owners of the schooner Percy Heilner, to recover of the owners of the steamer City of Paris the damages arising out of a collision which occurred in the harbor of New York, on the 14th day of April, 1866, and averred that it was filed "in behalf of the libellants and all parties having a common right of action arising out of the collision hereinafter mentioned, who may intervene as co-libellants or otherwise." It also set out the amount and value of the cargo on board the schooner, and averred that the same was being transported by the schooner as a common carrier, and prayed that the libellants might recover the value of the cargo, freight, and vessel, as the damages sustained by reason of the collision. Upon this libel, and an answer denying these averments, the cause went to a hearing upon the merits, no other person having applied to be allowed

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The Steamer City of Paris.

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to intervene as co-libellants or otherwise. Upon the hearing, an interlocutory decree was made in favor of the libellants, and a reference ordered to ascertain and report the amount of damages sustained by the libellants in the collision in question. Pending the reference, the Delaware and Mutual Safety Insurance Companies appeared before the court, and petitioned to be joined as co-libellants in the action, upon the ground that they were the insurers of the cargo on board the schooner, and, as such, paid to the owners of the cargo the amount of their insurance upon said coal as for a total loss, whereby they claimed to have become substituted in the place of said owners of the cargo, and entitled to recover of the City of Paris the value thereof.

BENEDICT, J. In actions of damage, where there are claims for injury to both vessel and cargo, the more usual, and, as heretofore generally considered, the better practice, has been to bring separate actions in behalf of the various parties entitled to recover, which actions are directed to be heard together upon the question of liability for the collision, separate decrees being rendered, and, in case of recovery, separate references ordered. Such is also the practice in the English Admiralty, although there it is usual to formally consolidate the actions for the purpose of the main hearing, and to dissever them before proceeding with the reference. (*Lowndes, Adm. Law of Collisions at Sea*, p. 209; *Coots*, p. 26.) A single action in the name of the owners of the vessel, as owners and as carriers of the cargo, is, in this country, also of frequent occurrence, and I know of no case where injustice or inconvenience has followed either of the methods referred to. The practice now proposed in this case seems to be considered to be now necessary, by reason of the decision of the Supreme Court in the case of the Commander-in-Chief, (1 *Wall.*, 43,) but I do not understand that decision to compel any change in the practice.



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The Steamer City of Paris.

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That case decides that, in causes of damage, when timely objection is not taken to the parties libellants, the owners of the injured ship will be allowed to recover for injury both to the ship and her cargo ; and that when such an action has been carried to a decree *in rem*, for the injury to cargo as well as vessel, upon a seizure of the vessel proceeded against, and due notice thereof, according to the course of the Admiralty, a Court of Admiralty will not entertain a second action in behalf of the owners of the cargo ; but, if necessary for the purpose of justice, will protect the interests of such owners in the distribution of the proceeds of the decree, rendered in the suit of the owners of the ship. This seems to me the extent of the decision, and, so construed, its correctness cannot well be doubted. (See also the *Ilos*, *Swabey*, 100.) But while I do not understand the effect of this decision to be to compel a joinder of all parties injured by a collision, as parties libellants in one action, the remarks of the court clearly indicate an opinion that such a joinder may well be made, and it will therefore be permitted in the present case, though I confess that I do not see the necessity or advantage of the proceeding. According to the opinion in the case of the Commander-in-Chief, the interests of the petitioner, in any amount which may be recovered by the owners of the schooner for cargo on board, can be protected in the distribution of the proceeds of the stipulation given ; or, inasmuch as the action of the owners of the schooner has been conducted without publication of the usual notice of seizure, and has proceeded no further than an interlocutory decree, a second action for the loss to the cargo might, at this stage, be instituted in the names of the petitioners. There may, however, be reasons which are not disclosed, which render the practice proposed desirable in this case, and, as no injustice will be caused to the claimants by allowing it, an order may be entered to join the petitioners as co-libellants, according to their prayer ; but it

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In the Matter of Samuel D. Waggoner, a Bankrupt.

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must be accompanied by a special order of reference, directing the commissioner, before whom the reference is pending, to take and report to the court, with his opinion thereon, such lawful evidence as the petitioners shall produce, to establish their right to participate in the decree, together with any evidence which the claimants may produce by way of defence to the demand.

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NOVEMBER, 1867.

IN THE MATTER OF SAMUEL D. WAGGONER,  
A BANKRUPT.

SPECIFICATIONS OF OBJECTION TO A BANKRUPT'S DISCHARGE.

If a creditor opposing a bankrupt's discharge would have a trial under section thirty-one of the Bankruptcy Act, his specification of objections must be sufficiently definite to enable the court to see that there exists a fair question of fact, necessary to be determined upon evidence outside of the papers, before the discharge can be granted.

In this case a creditor filed specifications of objections to the bankrupt's discharge, charging—

*First*, That the bankrupt has not conformed to his duty.

1. In that he has omitted to make a proper statement of the judgments against him referred to in the schedules annexed to his petition. Also the same as to particulars and consideration of the debts owing by him.

2. In that he has omitted to state the places of residence of several of his creditors, with sufficient accuracy to enable them to receive the notices required by said Act to be given to them.

*Second*, That he has concealed a large, and the greater

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In the Matter of Samuel D. Waggoner, a Bankrupt.

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part, of his estate and effects, and omitted to state the same in the schedules annexed to his petition.

On these specifications the creditor applied for a trial before the court.

BENEDICT, J. To enable an opposing creditor to obtain an order for a trial at a stated session of the District Court, under section thirty-one of the Bankruptcy Act, the specifications must be sufficiently definite and certain to enable the court to see that there exists a fair question of fact, necessary to be determined upon evidence outside the papers, before the discharge can be granted. In the present case the specifications are too general and indefinite, and do not entitle the party to an order for a trial at the stated session; nor do they raise any definite issue upon which a summary hearing and adjudication could be had. Some grounds of opposition to the discharge, set forth with sufficient definiteness to enable the court at least to see that the objections taken are not frivolous, or interposed merely for purposes of delay, should appear in the specifications before the court can be called upon to pass upon them. The objections therefore must be stricken out, with leave, however, to the creditors to file more definite specifications within three days.

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In the Matter of the Petition of F. A. Platt.

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NOVEMBER, 1887.

IN THE MATTER OF THE PETITION OF F. A.  
PLATT, RECEIVER OF THE FARMERS' AND  
CITIZENS' NATIONAL BANK, FOR AUTHOR-  
ITY TO COMPROMISE A DOUBTFUL DEBT.

RECEIVER OF A NATIONAL BANK. — JURISDICTION. — COMPROMISING  
DEBTS.

The National Banking Act (13 *Statutes at Large*, page 115), in the fiftieth section, provides that a receiver appointed under the Act may compromise doubtful debts "on the order of a court of record of competent jurisdiction."

*Held*, That this court was such a court.

In this case a receiver, appointed under the National Banking Act, applied, on a petition setting forth the circumstances, for leave to compromise a debt. The National Banking Act, in the fiftieth section, provides that the receiver may compromise doubtful debts "on the order of a court of record of competent jurisdiction." The question arose whether this court was a court of competent jurisdiction. The court, after consideration, decided that it had jurisdiction, and ordered the matter to be referred to a commissioner to take proof of the facts in the case, with his opinion thereon.

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In the Matter of Justus S. Redfield, a Bankrupt.

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NOVEMBER, 1867.

IN THE MATTER OF JUSTUS S. REDFIELD,  
A BANKRUPT.

POOR DEBTOR.—GENERAL ORDER No. 30.

An order, directing that the fees and costs in a bankruptcy case shall not exceed the amount of the bankrupt's deposit, should only be made after a personal examination of the bankrupt.

In this case the bankrupt applied, under General Order No. 30, upon an affidavit that he had no means, for an order that the fees and costs should not exceed the amount of the deposit.

The court held that, on similar applications, the order should only be made on the personal examination of the bankrupt as to his means.

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The Bark Jupiter.

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## Southern District of New York.

NOVEMBER, 1867.

## THE BARK JUPITER.

COLLISION BETWEEN SAILING VESSELS IN THE NORTH SEA.—JURISDICTION.—VESSEL CLOSE-HAULED ON STARBOARD TACK.—CHANGE OF COURSE IN EXTREMIS.

A Dutch schooner and a Russian bark came in collision in the North Sea, by which the schooner was sunk. Each vessel claimed that she was close-hauled, and that the other had the wind free. The bark was on the port tack, and the schooner on the starboard tack. Both vessels kept their courses, till so near that a collision was inevitable if they held on, when the schooner ported her helm, and shortly afterward the bark also ported, but too late. The direction of the wind was disputed on the evidence. The bark was going about eight knots an hour, and the schooner about two knots and a half;

*Held*, That, on the evidence, the schooner was close-hauled—as close as she could be. That, therefore, it was the duty of the bark to have ported earlier than she did, and to have kept out of the schooner's way.

That it was not a fault in the schooner that she luffed when she did, instead of starboarding her helm, for she had the right to assume that the bark would port, which she did do, when too late; but, for an act done under the circumstances in question, even if it had not been judicious, the schooner would not be responsible as for a fault, because it was done in a moment of peril, into which she had been brought by the fault of the bark.

That the bark was in fault in not keeping a vigilant lookout.

That this court had jurisdiction of the action.

BLATCHFORD, J. This is a libel for a collision, filed by the owners of the Dutch schooner *Aeolus*, against the Russian bark *Jupiter*, owned by residents of Bremen. The libel is filed by such owners in their own behalf, and as bailees of, and on behalf of the owners of, the cargo of the *Aeolus*. The schooner was on a voyage from Cronstadt, in Russia, to Koogerpolder, in Holland, with a

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The Bark Jupiter.

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cargo of linseed on freight. The bark was on a voyage from Bremen to New York, with a cargo and passengers. The collision took place between one and two o'clock in the afternoon, on the 5th of September, 1864, in the North Sea, in latitude  $56^{\circ} 7'$  north, and longitude  $5^{\circ} 15'$  east from Greenwich. The schooner was so injured that she sank within a few minutes, and was totally lost. The libel avers that the schooner was close hauled on her starboard tack, and heading somewhere about south-west by south; that the wind was strong from the northward and westward, and the sea high; that the bark was on her port tack, and heading nearly opposite to the schooner; that the bark had no sufficient lookout, and did not attempt to keep away, but kept right on towards the schooner; that the schooner put her helm to port, and tried to luff into the wind, and avoid the collision, but, being in the trough of the sea, did not answer her helm quickly; and that the bark was hailed to keep away, but paid no attention to the hail, and kept on till she struck the schooner on her port bow. The answer avers that the wind was west north-west; that the bark was close hauled and steering north by west, and sailing from seven to eight knots an hour; that the schooner was seen some three miles off, from two to three points on the starboard bow of the bark; that the schooner had the wind free, and was on a course which would have carried her to the starboard of the bark had both vessels kept their courses; that the bark, being close hauled, kept her course, and had a right to do so; that the schooner also kept her course, with the wind free, until the vessels approached each other, and until the schooner reached a position on the starboard bow of the bark, and slightly ahead, but still steering in a way that, if her course had been kept, would have carried her to the starboard side of, and under the stern of, the bark, when she suddenly luffed, coming up into the wind and changing her course nearly to the west, and came upon the star-

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The Bark Jupiter.

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board bow of the bark, the port bow of the schooner coming in contact with the starboard bow of the bark, and the schooner swinging alongside of the starboard side of the bark, and soon after sinking; that, as soon as the schooner was seen to luff, the wheel of the bark was put to port, and efforts were made to keep her off, but the distance between the two vessels was so small that very little if any change in the course of the bark was effected; and that the schooner, before the collision, had been steering south-west by south.

It is established, by the evidence, that the bark was heading north by west, and was close hauled on her port tack, and was sailing about eight knots an hour. It is claimed for the bark, that the wind was west north-west, or not further to the west than west by north, and that the bark was sailing within from five to six points of the wind. For the schooner, it is claimed, that the wind was west, and that the schooner was heading south-west by south, close hauled on her starboard tack, and sailing within five points of the wind. But the bark claims that the schooner was not close hauled, but was sailing with a free wind. If the bark and the schooner were both of them close hauled, it was the duty of the bark, being on her port tack, to give way, and it was the duty of the schooner, being on her starboard tack, to keep her course. But, if the schooner had the wind free, and the bark was close hauled, it was the duty of the schooner to give way, even though she was on her starboard tack, and it was the duty of the bark to keep her course, even though she was on her port tack. I have arrived at the conclusion, after a careful examination of the evidence, that the schooner was close hauled, and was sailing as close to the wind, on her starboard tack, as she could sail. The testimony of the master, and of all of her crew who have been examined, three in number, is, that she was sailing as close to the wind as she could lie. The master says, that even then she was to the leeward of the true



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The Bark Jupiter.

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course to her port of destination, and that he could not keep her up to her true course. Of the men on the bark, but two, the chief mate and Pepper, claim to have seen the schooner till just at the moment of collision, or to have noticed her course as she approached the bark from a distance. Holling, a passenger on the bark, saw the schooner two miles off, and says that she had the wind, as far as he could see, one or two points free. Much stress is laid by the bark upon the testimony of those on board of the bark as to the direction of the wind, and it is urged that, the wind being west north-west, and the schooner sailing south-west by south, she was not sailing within seven points of the wind, and was, therefore, sailing free, because the bark was sailing close hauled within five points of the wind. But the dispute about the course of the wind is only as to whether it was west or west north-west, a difference of only two points. If one point is taken off from the claim on one side, and one point is added to the claim on the other side, as to the direction of the wind, thus dividing the difference, then, the bark sailing west by north and the schooner south-west by south, each vessel would be sailing within six points of the wind. Without deciding as to the exact course of the wind, I think the testimony of those on the schooner, as to the fact that she was close hauled, is to be relied on, especially in view of the fact that she was making but two and a half knots an hour. According to the theory of the bark, the bark was making eight knots an hour while sailing within five points of the wind, while the schooner was sailing no closer to the wind than seven points, and making only two and a half knots an hour. According to the theory of the schooner, the bark was sailing as far off as seven points from the wind, while the schooner was within five points of it, a state of things more probable, from the respective rates of going of the two vessels.

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The Bark Jupiter.

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It was strongly argued for the bark, that the master of the schooner testified that, before the collision, the schooner luffed up into the wind as much as four points, and still had her sails full, and that, therefore, she must have had the wind free. It is true, that the master of the schooner says that the schooner had luffed about four points before the collision, and that, at the time of the collision, her sails were full. But it is not at all clear that she did luff to this extent. Gerzonius, one of her crew, who was on deck when she luffed, says, on his direct examination, that she "came up to one and a half points in the wind before the collision"; but, on his cross-examination, he says, that, "by luffing, she changed her course one point and a half," and that he did not notice whether her sails were full or shaking at the time of the collision. I think that what the master really testified was, that the schooner had luffed to about four points from the wind, and that what Gerzonius testified to, on his direct examination, was, that she came up one and a half points into the wind before the collision, that is, that she changed her course by luffing a point and a half, and came up to four points from the wind, and not that she changed her course four points by luffing and came up to a point and a half from the wind. For, the master says, that the schooner was sailing at the time five and a half points from the wind; Gerzonius says, four and a half to five points; Barf says, five to six points; Schipper says, six points. Schipper says, that the schooner's sails were full at the time of the collision, but Schwetzer, one of the crew of the bark, says, that the schooner's sails were shaking at the time of the collision. I think it is impossible to believe, on the whole evidence, that the schooner could have luffed up as much as four points and still have had her sails full. If she did luff up four points, her sails must have shaken. At all events, the evidence as to the extent of her luffing and as to whether, after she had luffed, her sails were

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The Bark Jupiter.

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or were not full, is so unsatisfactory, that it is not safe to predicate upon it any conclusion as to the course she was on when she started to luff, or as to whether she then had the wind free or not. The other testimony, before referred to, going to show that she was in fact close hauled, is much more reliable and is entirely satisfactory.

As the schooner was close hauled on her starboard tack, she was entitled and bound to keep her course, as against the bark. It is alleged by the bark, that the schooner changed her course before the collision, and thereby caused the collision by the luff she made, and that, if she had kept her course, the collision would not have occurred. But it is proved that the schooner did not luff until a collision was inevitable, if both vessels should keep their courses, and that she then luffed because she saw that the bark persisted in holding her course and would not port her helm. It was no fault on the part of the schooner to luff under those circumstances. When she luffed she was close to the bark. Pepper, a seaman on the bark, says, that the schooner was about three ships' lengths off when she changed her course. Schwetzer says, that, when the schooner was five or six lengths off, she was luffing into the wind. The master of the schooner says, that she was about a cable's length from the bark when she luffed. For an act done under those circumstances, *in extremis*, at the moment of peril, the schooner would not be responsible as for a fault. The peril into which she had been brought was not her own fault, but was the fault of the bark in not keeping off; and a movement to save herself, when a collision was inevitable, even though not a judicious one, cannot be imputed to her as a fault, or relieve the bark from responsibility for bringing on the peril. (*Bentley v. Coyne*, 4 *Wallace*, 512.) But the movement of the schooner to luff, instead of starboarding her helm, was proper, for she was entitled to conclude that the

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The Bark Jupiter.

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bark, if she made any movement, would port her helm, as the bark in fact did, but too late. If the schooner had starboarded and the bark had ported, such joint movements would not have tended to prevent a collision.

I am satisfied that this collision happened through negligence on the part of the bark in not porting her helm in time to avoid the schooner, and that she failed to port it in time because she had no proper lookout. The persons in charge of the bark at the time observed the schooner a long distance off, and then paid no further attention to her till the bark was only three or four ships' lengths off from her. Then, after the schooner had ported her helm and was luffing, the bark ported her helm, but too late to avoid the collision.

The claimants set up that, inasmuch as the bark is a Russian vessel, and her owners reside in Bremen, and the schooner is a Dutch vessel, and she and her cargo were owned by residents of Holland, this court has no jurisdiction of the action. A general objection to the jurisdiction of the court is taken by the answer. Without going into any extended discussion of the question, I am satisfied that this court has jurisdiction. (*The Johann Frederick*, 1 W. Rob., 36; *Flanders on Maritime Law*, § 381.)

There must be a decree condemning the bark, with a reference to a commissioner to ascertain the damages caused to the libellants by the collision.

*E. H. Owen*, for the libellants.

*Beebe and Donohue*, for the claimants.

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In the Matter of Charles H. McIntire, a Bankrupt.

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NOVEMBER, 1867.

**IN THE MATTER OF CHARLES H. MCINTIRE,  
A BANKRUPT.****SERVICE OF NOTICE, FORM No. 52.—REQUEST, FORM No. 28.**

When the discharge of a bankrupt is applied for after sixty days from the adjudication, the notice, form No. 52, need be served only on the creditors who have proved their debts, even though it contains a notice of the second and third general meetings of creditors.

It is not necessary, in such case, that the request of the assignee, form No. 28, should be furnished to the register.

In this case, at the request of the bankrupt, the register certified to the court two questions, viz. : (1) Whether, when the discharge is applied for after sixty days from the adjudication, the notice, form No. 52, if containing the notice of the second and third general meetings of the creditors, must be mailed to all the creditors known to the bankrupt, or only to such as have proved their debts ; (2) Whether, in applying for the order to show cause why a discharge should not be granted, after sixty days from the adjudication, the bankrupt must furnish to the register the request, form No. 28.

The register expressed his opinion, that it was safer to require the notice to be given to all the creditors, and that the request, form No. 28, ought to be furnished.

BLATCHFORD, J. The notice need be mailed only to those creditors who have proved their debts, and it is not necessary that the request of the assignee, form No. 28, should be furnished.

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In the Matter of Charles G. Patterson, a Bankrupt.

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NOVEMBER, 1867.

IN THE MATTER OF CHARLES G. PATTERSON,  
A BANKRUPT.

## EXAMINATION OF BANKRUPT.—GAMING.

A bankrupt under examination, in October, 1867, in proceedings commenced in June, 1867, having stated what amount of property he had a year before that time, was asked "Have you lost any part of it in gaming?"

*Held*, That the question, being broad enough to cover the time subsequent to the commencement of his proceedings in bankruptcy, was improper, as calling on him for an answer which might subject him to punishment for a criminal offence, under section forty-four of the Bankruptcy Act.

In this case the register certified to the court that the bankrupt, being under examination on October 30th, 1867, was asked: "How much property had you a year ago?" and answered: "I probably had what cost me \$100,000, in real and personal property, subject, perhaps, to liens of various kinds to half that amount;" that he was then asked: "Have you lost any part of that in gaming?" that the bankrupt objected to the question as incompetent and irrelevant, and the register overruled the objection and allowed the question; that thereupon the bankrupt, under instruction by counsel, refused to answer the question till ordered so to do by the court; and that the register was of opinion that the bankrupt should be compelled to answer the question. The bankruptcy proceedings were commenced June 25th, 1867.

BLATCHFORD, J. The question, so far as it called on the bankrupt to answer as to whether he had, since the commencement of the proceedings in bankruptcy, lost in gaming any portion of his estate, was objectionable, as

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The Bark J. G. Paint and her Cargo.

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calling on him for an answer which might subject him to punishment for a criminal offence, under section forty-four of the Bankruptcy Act. The question was broad enough to cover the time subsequent to the commencement of the proceedings in bankruptcy, and was, therefore, improper.

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NOVEMBER, 1867.

THE BARK J. G. PAINT AND HER CARGO.

SALVAGE AGREEMENT.

Courts of Admiralty will not allow a salvor to take advantage of his situation and to avail himself of the calamities of others to drive a bargain; but they will enforce a contract made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain.

Under the circumstances of this case, an agreement to pay to a steamboat \$3,000 for towing a vessel worth \$8,000, with a cargo of sugar, for twenty-seven hours, was sustained by the court.

BLATCHFORD, J. This is a libel for salvage, filed by Charles Loveland, master and part owner of the steamer Eureka, on behalf of himself and all others interested, against the bark J. G. Paint and her cargo. The bark is a British vessel, and was on a voyage from St. Jago de Cuba to New York, with a cargo consisting of 640 hogsheads, 205 barrels, 38 boxes, and 10 tierces, of sugar. She is 340 tons burthen, new measurement, and is two years old, and was worth about \$8,000 in United States currency at the time of the salvage service. It does not appear what was the value of her cargo. On the 30th of March, 1867, about 6 o'clock A. M., the bark was at anchor in six fathoms of water, about four miles east north-east

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The Bark J. G. Paint and her Cargo

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from Absecom light on the New Jersey coast. She had been blown off from pilotage ground, while looking for a pilot to bring her into the port of New York, eight days before, and had lost her rudder in a gale at that time. For two days afterwards she continued to lie to, and then she fell in with a brig, to which she made a signal by setting her colors union down. The brig took off from her the women and children, and a sick sailor, and sailed in company with her for some time. The bark sailed on the wind and steered by her sails, but she could not steer by them when off the wind. After a time the brig took the bark in tow, as the wind was light, the bark being then about 15 miles to the southward and westward of Cape May, and intending to go in to Hampton Roads as the nearest port. It then became calm and both vessels came to anchor, land being visible. Subsequently the wind came out from west north-west, blowing off shore, and the vessels sailed in company along the shore, out of sight of land, on a course north or north north-east, close to the wind, with their port tacks aboard. No opportunity was afforded to try and steer the bark before the wind, or to wear ship. She was steered by her sails. The brig afterwards got astray, but the bark kept on her course, and got out a spar to assist in steering. The brig found the bark again and the two sailed in company, the wind being steady and blowing favorably. The bark was obliged to sail in such direction as she could, when on the wind. The wind getting light again, the brig took the bark in tow again, and land was made, which the brig took to be Cape Henlopen, and the bark thought was Absecom. The latter idea proved to be the correct one. The bark came to anchor there, although the weather was fine and the wind favorable for continuing her course to Sandy Hook, for the reason that the brig insisted, even after the light on shore was set on the evening of the 29th of March, that the light was Cape Henlopen light, and not Absecom light. The brig let



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The Bark J. G. Paint and her Cargo.

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go of the bark and stood off, and at sunrise the next morning was 9 miles east south-east from the bark, hull down.

At 6 o'clock on the morning of the 30th, the steamer, being on a voyage from New York to Little Egg Harbor, (between which place and New York she was a regular trader,) and being at the time about 2 miles off from the bar at the entrance of the inlet, and 30 miles from her dock at Little Egg Harbor, saw the bark lying at anchor, about 7 or 8 miles south of the bar, and believing her to be in distress, ran down to her. When the steamer came within 2 miles of the bark, she saw on the bark a signal of distress, being a flag set union down half way up the peak. The steamer reached the bark about 8 o'clock A. M. The bark, on being hailed from the steamer, said that she wanted assistance, and her master asked the captain of the steamer what he would charge to tow the bark to the Delaware Breakwater. The captain said, that he would not tow her to the Breakwater, but would tow her to New York. The master then asked, what he would charge, and, at the request of the captain, went on board of the steamer. The captain there told the master, that he would tow him to New York for \$4,000. The master said, that he would not give it, but would let the bark go ashore first, and offered \$2,000. The captain refused that, and the master started to return to the bark. Either before the master left the steamer, or after he got into the small boat, the captain said he would take \$3,000. The captain's version is, that the \$3,000 offer was made before the master left, that the master refused it and started to return to the bark, and the steamer started her screw ahead to leave, and that the master, when he got a short distance off, said he would give the \$3,000. The master's version is, that, after his offer of \$2,000 was refused, he got into his boat to leave, that then the \$3,000 offer was made, that he returned to the bark without making a bargain and

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The Bark J. G. Paint and her Cargo.

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consulted his mates, and that all concluded to give the \$3,000. The clerk of the steamer drew a written agreement, which the master signed on board of the steamer, whereby the master promised to pay to the steamer or her owners, in one month, \$3,000 for towing the bark from Absecon to New York. This agreement, so signed, was delivered to the captain. The steamer took the bark in tow at first by a hawser behind, but, after about an hour, took her alongside, and thus towed her to New York, and anchored her off the Battery. She was towed for twenty-seven hours. The steamer had from a quarter to a half of a ton of coal left when she arrived at New York. Little Egg Harbor bar is 90 miles from New York. The usual time of the trip of the steamer, from New York to where she was when she turned aside to go to the bark, was about 10 hours. Her consumption of coal was 7 or 8 tons for 14 or 15 hours running. The steamer was worth \$22,000, and had on board at the time 20 tons of cargo, destined for Little Egg Harbor, which she subsequently delivered there and collected freight for.

The captain of the steamer says, that the wind was west south-west, and blowing hard when he reached the bark; that it was misty when he took her in tow; that he thought she would go on the beach in an east wind if she did not take his offer; that it was 50 or 60 miles nearer to the Breakwater than to New York, but he could not have gone to the Breakwater and back sooner than to New York and back, because of the head sea; and that he could not, for want of coal, have got the bark to the Breakwater.

The master of the bark says that, when the steamer reached him, the wind was light off shore, but it looked as if they were going to have a storm; that, if the wind had blown on shore, there would have been danger; that there was not any time after the bark lost her rudder when she was perfectly unmanageable; that he does not consider a vessel without a rudder safe; that, if he had

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The Bark J. G. Paint and her Cargo.

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been on a lee shore, he would have had to trust entirely to his anchors, and, if his ground tackle had given way, he would have gone ashore ; that, with the wind right on shore, there would not have been much salvation ; and that the place where the bark was anchored was a dangerous place. The mate of the bark testifies that if, at the place where the steamer found the bark at anchor, the wind had changed to blow on shore, there would have been danger of going ashore, if the anchors had failed to hold. The bark did not leak, and was not otherwise disabled than by the loss of the rudder. When the steamer arrived at New York with her, the wind was south-east, and it was storming, and had been so for three or four hours.

The answer of the bark does not set up that any unfair advantage was taken of the circumstances in which the bark was found, to exact from her an unreasonable contract, or that the price agreed to be paid for the service was more than the salvage service was worth. It sets up, that the master asked the captain of the steamer what he would ask to tow the bark to the Breakwater ; that the captain refused to tow her to the Breakwater, but said he would tow her to New York for \$4,000 ; that, after some negotiation on the subject, the master agreed to give \$3,000 to be towed to New York, which was accepted ; that, while the claimants of the bark do not admit that such service was worth \$3,000, yet, as the master agreed to pay that sum, they, so far as respects the bark and freight, are willing to abide by the contract ; that, nevertheless, if the court shall not consider such sum just and reasonable, as respects the owners of the cargo, then the claimants of the bark desire to have the benefit of any reduction thereof ; and that such contract was made for the benefit of the cargo as well as of the vessel, and the cargo is bound to contribute and pay its just proportion of such salvage service.

The answers of the claimants of the cargo deny that

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The Bark J. G. Paint and her Cargo.

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the service was worth \$3,000, and allege that the agreement to pay the same was improperly exacted out of the master of the bark, by taking advantage of the peculiar circumstances in which he was placed, and that it should not be enforced against the cargo, although they say they are willing to pay a reasonable and liberal compensation for the trouble, labor and services of the libellant, and for the assistance of the steamer, and they claim that a proper proportion should be paid by the owners of the bark and her freight.

It is well settled that Courts of Admiralty will not allow a salvor to take advantage of his situation, and to avail himself of the calamities of others to drive a bargain; but yet they will enforce a contract made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain. (*Post v. Jones*, 19 *How.*, 160; *The Schooner Emulous*, 1 *Sumner*, 210; *The A. D. Patchin*, 1 *Blatchf. C. C. R.*, 414.)

After a careful consideration of all the facts in this case, I am unable to come to the conclusion that the sum agreed upon, \$3,000, is an unreasonable compensation for the service rendered, or that the agreement to pay it was made under such circumstances that the sum fixed by the agreement ought not to be taken as the measure of the salvage compensation. I therefore award to the libellant the sum of \$3,000 as such compensation, with interest from April 30th, 1867, the amount to be apportioned between the vessel and the cargo by a commissioner, on a reference for that purpose, if such apportionment is not otherwise fixed by the parties.

*Beebe & Donohue*, for the libellant.

*E. H. Owen*, for the bark.

*D. D. Lord*, for the cargo.

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The Steamer Saragossa.

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NOVEMBER, 1867.

## THE STEAMER SARAGOSSA.

## SALVAGE.—DISTRIBUTION.

Towing a steam vessel which has lost the use of her steam machinery by an accident, although she is sound in hull and masts, is a salvage service.

It is not necessary that the distress should be actual or immediate, or that the danger should be imminent or absolute. It is sufficient if, at the time when the service is rendered, the vessel has encountered any damage or misfortune which may possibly expose her to destruction if the service be not rendered.

Where a steamer, which has lost the use of her machinery, was towed by another steamer about sixty or sixty-five miles to Charleston, the latter losing by the service not over two or three hours of time, and the former saving three or four days, the vessel towing, with her cargo, being worth \$230,000, and the saved vessel and her cargo being worth \$100,000, the court awarded \$900 salvage. Of this \$900, \$400 was allotted to the owner of the saving vessel, and \$50 to her master, and the remaining \$450 was ordered to be divided among the officers and crew, including the master, in proportion to their wages.

BLATCHFORD, J. This is a libel for salvage, filed by Cornelius K. Garrison and others, owners of the steamer San Salvador, on behalf of themselves and all others claiming any interest, against the screw steamer Saragossa, her tackle, &c. The crew of the San Salvador have come in by petition and been made co-libellants. On the 30th of April, 1867, the Saragossa, being, with her cargo, of the value of \$100,000, and on a voyage from New York to Charleston, broke the coupling to her shaft so that her screw became of no service. While in this condition she was found by the San Salvador, at a point about sixty to sixty-five miles from Charleston bar, and about fifty miles south of Frying Pan Shoals. The San Salvador was on a voyage from New York to Savannah, with a cargo and passengers, and was, with her cargo, of the value of \$230,000. The Saragossa was in the usual track of vessels

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The Steamer Saragossa.

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running down the Atlantic coast, and attracted the attention of the San Salvador by hoisting her ensign, union down. She had her sails set, the wind being light from the northward and eastward, but she was making very little headway. She asked the San Salvador to tow her to Charleston. The San Salvador towed her from sixty to sixty-five miles, using the hawser of the San Salvador, and left her in a safe place inside of Charleston bar. The service occupied about nine hours, at a speed of about seven knots an hour, the usual speed of the San Salvador in like weather being about eight knots an hour. What wind there was was fair to carry the Saragossa to Charleston by means of her sails, and she was in all respects in a good condition, except the accident to her machinery. The sea was very smooth, and it would probably have taken her three or four days to reach Charleston with her sails, it being nearly a dead calm. The usual route of the San Salvador would have carried her about nine miles outside of Charleston bar, and she deviated from her route at an angle of about fifteen degrees. The loss of time to the San Salvador was not over two or three hours, with the corresponding increased expense of coal, and the saving of time to the Saragossa was three or four days, with the saving of her expenses for that time.

This service was a salvage service. In order to make a salvage service it is not necessary that a vessel, whether sailing or steam, should be unnavigable, or that a steam vessel should be injured not merely in her machinery but in her hull or her sails also. Where a vessel has not received any injury or damage, and is in the same condition she would ordinarily be in without having encountered any damage or accident, a service rendered to her is not a salvage service. (*The Reward*, 1 W. Rob., 177.) A steam vessel which has lost the use of her steam machinery by an accident, is not in the same condition she would ordinarily be in, although she is sound in hull and masts and has the use of her sails, and a service rendered to

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The Steamer Saragoosa and her Cargo.

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her under such circumstances, by towing her, is not a mere towage service, but is a salvage service. It is not necessary that the distress should be actual or immediate, or that the danger should be imminent or absolute, but it is sufficient if, at the time the assistance is rendered, the vessel has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered. (*The Charlotte*, 3 W. Rob., 68, 71.)

I think, in this case that \$900 is a proper compensation. Of this sum, I award \$400 to the owners of the San Salvador and \$50 to her master. The remaining \$450 is to be divided among the officers and crew, including the master, in proportion to their respective monthly wages, the apportionment to be made by a commissioner, on a reference, unless the parties agree upon it. The claimant must, also, pay the costs of the suit.

*Beebe & Donohue*, for the libellants.

*E. C. Benedict*, for the claimant.

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NOVEMBER 1867.

## THE STEAMER SARAGOOSA AND HER CARGO.

## , SALVAGE.—DISTRIBUTION.

Where a steamer which had broken her machinery, so that it could not be used, but could have been made fit for use in a day or two, and which was making two and a half knots an hour under canvass, was towed by another steamer, for about thirty-four hours, to Fortress Monroe, and thence to Norfolk, where the salvor vessel was compelled to go for coal, and, at the time of their arrival at Fortress Monroe, it began to blow, and stormed so heavily that the latter was unable to go to sea till the second day after, and she then met with severe weather on

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The Steamer Saragossa and her Cargo.

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her way to New York, by which she was somewhat injured and was also compelled to put back to Norfolk for more coal:

*Held*, That neither could the fact, that the salvor vessel was saved from exposure to storm by going into Fortress Monroe, be taken into consideration to diminish her compensation for the services she rendered, nor could the storms which she afterwards met, or the injury which they inflicted upon her, be considered for the purpose of increasing that compensation.

The salvor vessel with her cargo and freight being worth \$434,000, and the vessel saved with her cargo and freight being worth \$100,000, and both carrying passengers, the court awarded \$9,000 salvage.

This sum was distributed, one half to the owners of the salvor vessel, \$500 to her master, and the rest to her officers and crew, including the master, in proportion to their wages.

It is the policy of Courts of Admiralty to encourage salvage services by large, powerful, well equipped and valuable steamers, by giving their owners one-half of the compensation awarded.

BLATCHFORD, J. This is a libel for salvage, filed by William H. Goodspeed, owner, and George W. Ward, master, of the steamer Charles W. Lord, on behalf of themselves and of the crew of the Charles W. Lord, against the screw steamer Saragossa, her tackle, &c., and her cargo and freight money. The Saragossa was on her way from Charleston to New York. The Charles W. Lord was on her way from Galveston, Texas, via Key West, to New York. On the night of the 17th of March, 1867, at about ten o'clock, the Charles W. Lord, having reached a point about nineteen miles south-east of Cape Hatteras light, had her attention attracted by the burning of blue lights to the south-east of her. She was then heading to the northward, having rounded Cape Hatteras Shoals, but, on seeing the lights, she kept off and ran down to them. She there found the Saragossa with some canvas set but not under steam. In reply to a hail, the Saragossa asked to be towed to Fortress Monroe, and said that she had broken down. The Charles W. Lord assented to taking her in tow and did so. The disabling of the Saragossa was caused by the giving way of the coupling between two sections of her shaft, which rendered her screw useless. She was making about two and a half knots an



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The Steamer *Saragossa* and her Cargo.

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hour under canvas, and was engaged in repairing, or in making preparations to repair, the machinery. Her engineer says, that he could have repaired the break, at sea, in from twenty-four to thirty-six hours, so as to have made three and a half knots an hour under steam without canvas, and have made a port. There was a bad sea on at the time, and the wind was strong from the north-west, and the *Saragossa* was about five or six miles from the Gulf Stream. About half past eleven o'clock that night the towing began by a hawser run from the stern of the *Charles W. Lord*. For the first eight hours little progress was made, on account of the bad sea and the strong head wind. About eight o'clock on the morning of the 18th, the wind moderated, and the vessels got in under the land. They arrived at Fortress Monroe on the morning of the 19th, about seven or eight o'clock. The shaft of the *Saragossa* was disconnected during all the time of the towing, so that her machinery was not used. She was in good condition in all respects, except the accident to her machinery, and her sails and spars and masts were in good order. The *Charles W. Lord* had about seventy tons of coal when the towing commenced, and about thirty-two when she reached Fortress Monroe. She would have used from twenty-six to thirty tons in reaching New York, from the place where the towing commenced, if she had not done the towing. She was of the value of \$150,000 at the time of the service, and was a new vessel. She had on board a cargo valued at \$273,000, (of which \$70,000 was the value of \$50,000 of specie). Her freight money for the voyage was \$8,700, and her stores were worth \$2,500. Her cargo consisted principally of cotton, hides and wool. She had sixteen passengers. The *Saragossa* had a crew of thirty-seven persons and twenty-three passengers, among whom were some females. The *Saragossa* was worth from \$45,000 to \$50,000, her cargo was worth \$52,000, and her freight money was \$1,500.

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The Steamer Saragossa and her Cargo.

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The service rendered in this case was a salvage service, and was one of merit, and ought to be properly rewarded. But there is nothing in the case to justify the extraordinary demand made at the trial, that the libellants should receive more than \$40,000 as salvage compensation. The weather was not stormy; there was no exposure or risk of life on the part of the master and crew of the Charles W. Lord; there was no imminent peril to the Saragossa; there was no great amount of labor or skill bestowed or displayed on the part of the salvor vessel; nor was there any great length of time occupied in the service. On the other hand, the value of the property imperilled by the deviation of the Charles W. Lord from her voyage was large, and the service was rendered promptly and efficiently; and the policy of the law is to encourage salvage services by steam vessels, especially when rendered to steam vessels which are carrying passengers.

I do not consider, as an element in the salvage service in this case, any speculation, growing out of the gales which blew between the time the vessels arrived at Fortress Monroe and the time the Charles W. Lord subsequently arrived at New York. Whether the Saragossa would or would not have been able to repair her machinery before the gales came on, so as to have had its aid in keeping off from a lee shore, or in keeping her head to the wind, or whether, if she had not succeeded in repairing her machinery before the gales came on, she would or would not have been able to lay to in a gale by the use of her sails alone, are questions having too many contingent ingredients, to be considered in estimating the value of the salvage service. And, if I were to consider them, I should hold, that the weight of the testimony is, that the Saragossa could have repaired her machinery, so that she would have had the use of steam before the gales came on, and that if she had not repaired her machinery she would still have been able to lay to by the

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The Steamer *Saragossa* and her Cargo.

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aid of her sails alone. So, also, as to the gales which the *Charles W. Lord* encountered on her voyage from Fortress Monroe to New York, and which caused damage to her, and which it is claimed she would not have encountered if she had not deviated from her voyage to assist the *Saragossa*, because she would have reached New York before the gales came on,—all such considerations are too remote to enter into the question of the compensation for the service rendered. In the case of *The Schooner Emulous*, (1 *Sumner*, 215,) it was argued, that a storm which occurred the next day after the saved vessel and cargo reached a harbor, would have very probably occasioned their total loss if they had not then been in port. In reply to this, Judge Story says: “Admitting that to be true, still it cannot constitute a material ground, in a case like the present, for enhancing the salvage. Salvage is a compensation for the rescue of the property from present impending perils, and not for the rescue of it from possible future perils. It is a compensation for labor and services, for activity and enterprise, for courage and gallantry, actually exerted, and not for the possible exercise of them, which, under other circumstances, might have been requisite. It is allowed because the property is saved, not because it might have been otherwise lost upon future contingencies. Subsequent perils and storms may enter as an ingredient into the case, when they were foreseen, to show the promptitude of the assistance and the activity and sound judgment with which the business was conducted, but they can scarcely avail for any other purpose. Ought the salvage to be diminished by a favorable state of the weather after the arrival in port? If not, why should it be increased by an unfavorable state of the weather. To introduce such ingredients into the element of salvage, which were neither foreseen nor acted upon, would compel the Court to deliver itself over to conjectures resting on loose probabilities, the nature and extent of which could never be measured.

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The Steamer *Saragossa* and her Cargo.

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It would be to go off soundings, to desert the facts, and to be guided by speculations always questionable and sometimes deceptive." These views are eminently sound, and have always been followed by Courts of Admiralty in the United States. They were applied by this Court in the case of *The Cornelius Grinnell*, (October, 1864.) In that case, a salvage service was rendered by a steamer. The steamer, in pursuing her voyage afterwards, struck, at low water, at a place where she would not have struck at high water, and it appeared that, if she had not been delayed by stopping to render the salvage service, she would have passed at high water, instead of at low water, the spot where she struck. She was injured, by the striking, to the amount of \$2,500, but the court threw out all consideration of the damages caused by the striking.

In the present case, the *Charles W. Lord* was engaged in towing the *Saragossa* for about thirty-four hours, from the time she took her in tow till the two vessels arrived at Fortress Monroe. The *Charles W. Lord* was obliged to go to Norfolk to procure coal, and arrived there about ten o'clock A. M. on the 19th of March. When she was about to anchor the *Saragossa* at Fortress Monroe, she was requested by the *Saragossa* to tow her to Norfolk, and consented to do so, because she had to go there herself for coal. She accordingly took the *Saragossa* in tow to Norfolk. About the time the two vessels arrived at Fortress Monroe it commenced to storm, with snow, and about six hours afterwards to blow. It blew heavily that day, and blew a gale from the eastward that night and through the 20th and until the morning of the 21st, so that the *Charles W. Lord* would not go to sea. During that gale it blew so heavily that eight or ten steamships came into Hampton Roads from sea for a harbor. When the *Charles W. Lord* did go to sea, she encountered a gale which compelled her, after about three days and a half, to return to Norfolk for more coal. During that gale she carried away her steering gear for

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The Steamer *Saragossa* and her Cargo.

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a time, but repaired it at sea, and suffered other damage. Now, if we could enter the region of speculation so as to take into account what might have happened to the *Saragossa* if she had been out in the gales which came on after she reached Fortress Monroe, we must equally speculate in regard to the *Charles W. Lord*. And, on the evidence, it would be reasonable to say that, in consequence of her having been delayed by towing the *Saragossa*, she was saved from exposure and damage, to an extent open wholly to conjecture, by not being out in the gale which commenced on the 19th. But this fact ought not to diminish the value of the salvage service she rendered; nor can the losses she did suffer in the gales she afterwards met with, before she reached New York, enhance such value. Notwithstanding the season of the year, nothing which happened in regard to wind or weather, can, in fact or in judgment of law, be reasonably said to have been foreseen, much less acted upon, during the time the salvage service was in progress.

In view of all the facts in this case, the salving vessel being a steamer, her value and that of her cargo, stores and freight money being \$434,200, the risk to which she was put in reference both to herself and her cargo, the value of the *Saragossa* and her cargo and freight money, which was, in round numbers, \$100,000; the condition in which the *Saragossa* was, and the nature and duration of the salvage service, I think that the sum of \$9,000, or a little less than one eleventh of the value of the property saved, is a liberal and, at the same time, a fair compensation. Of this sum I award one-half, or \$4,500, to the owner of the *Charles W. Lord*. The usual proportion given to the owner is one-third. (*The Blaireau*, 2 *Cranch*, 240, 269, 271; *The Henry Ewbank*, 1 *Sumner*, 427.) But that was a rule fixed in reference to sailing vessels, and the policy of Courts of Admiralty now is to encourage salvage services by large, powerful, well equipped and valuable steamers, by giving to their owners as large a

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The Steamer Saragossa and her Cargo,

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share as one-half in the compensation awarded. (*The Howard*, 3 Hagg. Adm. R., 256; *The Earl Grey*, Id., 363; 2 *Parsons' Maritime Law*, book 3, ch. 7, p. 622, note 7.) Of the remaining \$4,500, I award \$500 to the master of the *Charles W. Lord*, on account of his responsibility in undertaking the salvage. The remaining \$4000 will be distributed among her officers and crew in proportion to their respective monthly wages, the master sharing *pro rata* in the \$4,000, in addition to the \$500 specially allotted to him. The apportionment will be made by a commissioner, on a reference, unless it is agreed upon by the parties. The costs of the suit, also, must be paid by the claimants.

*Richard H. Huntley*, for the libellants.

*Beebe & Donohue*, for the claimants.

# INDEX.

## B

### BANKING ACT.

The National Banking Act (18 *Statutes at Large*, page 116), in the fiftieth section, provides that a receiver appointed under the Act may compromise doubtful debts "on the order of a court of record of competent jurisdiction."

*Held*, That a District Court of the United States was such a court. *Platt's Petition*, 534

### BANKRUPTCY ACT.

Construction of § 1. *Hasbrouck's Case*, 405

Construction of § 4. *Morford's Case*, 265; *Orne's*, 365; *Pulver's*, 382; *Bellamy's*, 391; *Hasbrouck's*, 408; *Patterson's*, 450; *Levy's*, 501

Construction of § 6. *Pulver's Case*, 382; *Levy's*, 505

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Construction of § 21. *Seymour's Case*, 353

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Construction of § 26. *Morford's Case*, 265; *Baum's*, 277; *Hill's*, 326; *Seymour's*, 351; *Bellamy's*, 397; *Patterson's*, 452; *Levy's*, 498

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Construction of § 29. *Hill's Case*, 324; *Bellamy's*, 392 & 429

Construction of § 30. *Hill's Case*, 324

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Construction of § 43. *Am. Water Proof Cloth Co.'s Case*, 526

Construction of § 44. *Patterson's Case*, 544

Construction of § 47. *MacIntire's Case*, 281; *Bellamy's*, 430; *Levy's*, 499

### BILL OF LADING.

An agreement in a bill of lading by which the ship promised to carry British sovereigns from one port to another

and there deliver them, is not a promise to pay money, but to transport articles on freight. *The Patrick Henry*, 292

See DAMAGES, 1.

DELIVERY OF CARGO, 3.

### BOTTOMRY.

Under the rules which are applied in favor of bottomry bonds as against prior bottomries, mortgages, and other loans to the master or owner, a bottomry bond binds not only the ship, but her whole earnings. But a distinction is made in the cases, between advances on freight and other advances, and it is held that sums advanced upon account of the freight must be deducted in preference to the bottomry.

Under the circumstances of this case, freight was held to have been, so far as the ship owner was concerned, paid, to the extent of an advance which had been made, and not to be liable for a subsequent bottomry.

The power to hypothecate by bottomry the cargo as well as the ship, is one conferred by the maritime law to facilitate commerce; and it will be in furtherance of that object to limit the power, as to the freight, to the interest of the ship owner in the freight. This will enable the charterer to make an advance without risk of losing his security by a subsequent bottomry, which in many cases will enable a ship to raise money without bottomry, and will work no injustice to shippers of cargo, who, shipping in a chartered ship, may be held to have assented to the terms of the charter which provides for the advance. *The Freight Money of the Anastasia*, 188

See UNITED STATES PROPERTY.

## C

### CASES CRITICISED.

Pratt v. Reed, (19 How. 359.) *The James Guy*, 112

The United States v. Segars, Mayoz et al. claimants (16 Legal Intelligencer, 388). 4 Cases Silk Ribbons, 214

Taylor v. Carryl (20 How. 483). *The Sailor Prince*, 234; *The Circassian*, 139

Blair v. Bemis. *Atkins v. The Fibre Dis. Co.*, 118

The General Smith (4 Wheat. 438). *The Circassian*, 141

Duncan v. Topham (8 C. B. 65.) *The Onrust*, 445

### CHARTER PARTY.

Where a vessel was chartered in New York to bring a load of cedar from Bayport, Florida, to New York, the charter containing the clause "It is understood that the vessel is now loading for Key West or Tortugas, and is to proceed thence direct to load under this charter," and on her delivery of her outward cargo at the Tortugas, she was seized by the officer in command of Fort Jefferson, and was compelled to perform two voyages to Key West for coal with a file of soldiers on board, and then being released after a detention of fifty days, went at once to Bayport, where she was loaded under protest.

Held, That under that clause in the charter, the owners of the vessel had not agreed to be at the Tortugas or at Bayport at any specified time, and time therefore was not a specific and essential element in the contract.

That the meaning of the contract was that the vessel was to proceed without unreasonable delay and by the usual route; and that the contract would have been the same if the word "direct" had been left out.

That under this charter the master of the vessel was bound to the highest degree of diligence in going from Tortugas to Bayport.

That he was not responsible for delays in that voyage caused by irresistible force.

That on the facts in this case the master was entirely faithful and diligent and the vessel was not responsible for any damages occasioned by the enforced delay. *The Onrust*, 431

See DELIVERY OF CARGO, 2.  
DEMURRAGE.

### COLLECTOR.

It is the duty of a Collector of Internal Revenue on seizing property, forthwith to turn the case over to the proper law officer of the Government. *Fifteen Empty Barrels, &c.*, 125



## COLLISION.

## 1. BETWEEN STEAMERS.

1. Where a propeller coming down the East River, had a ferry-boat, which was crossing from New York to Brooklyn, on her starboard hand, and the ferry-boat kept her course, as was admitted by the answer—*Held*, That under articles 14, 16 and 18 of the Rules of Navigation, the propeller would be liable for a collision under such circumstances.

That the propeller had not made out a special case under article 19.

That, under the circumstances, it would have been prudent for the propeller to have ported her helm, and gone under the ferry-boat's stern, whereas she did attempt to cross her bows, and that having selected the most hazardous of two courses open to her, she must be held responsible for its failure of success.

That the fact that the propeller, as she neared the ferry-boat, blew two whistles, and received two whistles in reply, did not alter the case. The two whistles in reply would amount to nothing more than an indication that the ferry-boat acquiesced in the right, so claimed by the propeller, to select her own method of avoiding the former. Moreover, the danger was then imminent. *The Chesapeake*, 23

2. Where a ferry-boat crossing from Brooklyn to New York, after getting out of her slip, saw a steamship coming up the river, which had already sheered to starboard to go under the ferry-boat's stern, and instead of keeping on, stopped and backed, her pilot then blowing two whistles, but the steamship, though stopping and backing, could not then avoid the collision, but struck the ferry-boat in the side at right angles,

*Held*, That the ferry-boat was in fault in not keeping on her course.

That the two whistles blown after the pilot of the ferry-boat had stopped and backed, amounted only to a notification of what he had done, and gave to the steamship no opportunity of assenting or dissenting; and dissent on the part of the steamship by whistles then would have availed nothing.

That the ferry-boat was in fault in

going out of her slip at full speed, without keeping a careful look-out for approaching vessels.

That the steamship was also in fault in not complying with the State law in regard to the navigation of the East River, and going as near the middle of it as practicable.

That both vessels being in fault, the damages must be apportioned.

That evidence from persons on the bows of the steamship, not concerned in her navigation, but acquainted with the harbor and the capacities of vessels, is entitled to great weight on the question, whether the collision would have been avoided if the ferry-boat had kept her course. *The Favorita*, 30

3. Where a steamboat was coming down the Hudson River, and approached the track of a ferry-boat which was crossing from Hoboken to New York, and stopped her engine, but started it up again when the ferry-boat was directly ahead of and close to her, and struck the ferry-boat on her port quarter, and the pilot of the steamboat testified that he made no attempt to swing his bow to starboard, although a swing of ten or fifteen feet would have carried him clear, and excused his doing nothing by saying he had not time to do anything, while other witnesses testified that he did shift his wheel, and was swinging to west at the time of the blow,

*Held*, That the ferry-boat, on seeing the steamboat stop her engine, was entitled to consider that she intended to allow the ferry-boat to pass her bows, and to act accordingly.

That the ferry-boat was therefore free from fault in keeping on.

That the starting of the steamboat's engine again in such circumstances was a fault on her part.

That if the pilot's excuse for not sheering be held good, it shows the vessels in such close proximity as to make clearly manifest the impropriety of his starting the engine. If it is not held good, then he was in fault in not attempting to sheer; and if, as stated by other witnesses, he did sheer, his statement, on which the claimant chiefly relies, is discredited. *The Cayuga*, 171

4. Where a large steamer, having come through the main ship channel of Hell Gate, bound to New York, at the rate of twelve miles an hour, as she approached the slip of the Astoria ferry, saw a ferry-boat in and just leaving the slip on the New York side, and blew two whistles, but the ferry-boat came out of her slip so far that the steamer, not being able to pass ahead of her, blew one whistle and tried to go astern, but the ferry-boat then stopped and backed, and was struck amidships on the port side, and sunk, the evidence being very conflicting and unsatisfactory,

*Held*, That the ferry-boat was in fault in not holding back for the steamer to pass ahead of her.

That the steamer was in fault in not slackening her speed as she rounded a point just above the ferry.

That the ferry-boat was guilty of gross negligence in omitting to carry a whistle, though that circumstance seemed to have had no influence on the movements of either vessel. *The Electra*, 282

5. A steamer held to be in fault in not having a proper lookout, and in going so close to another steamer as 50 or 100 feet, when there was abundant sea room.

*Held*, That the fact of her being in charge of a pilot was no defense.

That the other vessel was also in fault in not having the lights required by law, and that the collision was the result of these faults on both vessels. *The Alabama and The Gamecock*. 476

## 2. BETWEEN STEAMER AND SAILING VESSEL.

6. The schooner *Gold Fish* was coming through Hell Gate to New York, on an ebb tide, with a six knot breeze from W.N.W. She stood over from Negro Point, close-hauled on her star-board tack, till near Hallett's Point, and then tacked off to the northward. Before going but a short distance, she was run into by the steamboat *Empire State*, which was bound from New York.

*Held*, That the circumstances made out a case where the burden of proof was on the steamboat to show by pre-

ponderating evidence that she was prevented from passing in safety by some fault in the management of the schooner.

That it was not the duty of the schooner to remain in the wind. What the law requires of a sailing vessel in a narrow channel is to beat out her tack, and having done so, to come about with all possible dispatch upon the other tack, leaving to an approaching steam vessel the responsibility of being in a position to enable her to do so without danger.

That though there may be cases where a departure from this rule would be justified, and even required, the present was not one. No sailing vessel in Hell Gate can be asked to check her headway to enable a steamboat to pass her at Hallett's Point.

That the rule requiring a sailing vessel to beat out her tack does not require her in all cases to go as near the shore as the depth of the water will permit, without reference to other exigencies. A schooner tacking above Hallett's Point, is entitled to come about in time to insure avoiding the reef at the Point, and the place must vary according to the capacity of each vessel and the strength of the wind and tide.

That the fact that the answer, when put in, did not deny the averment of the libel that the tack was properly beat out, was to be considered on a conflict of testimony on that point, even though the answer was allowed to be amended on the hearing by inserting such a denial.

That the steamer was in fault in not stopping in time, and that, having selected the most hazardous course, by not waiting till the schooner had passed her to the northward, and having failed of success in it, she must be held responsible for the damages. *The Empire State*, 57

7. Where a steamboat was coming down the East River round Corlear's Hook, and a thick fog shut down upon her, and not being able to anchor, the bottom being bad, and the place dangerous by reason of the ferries, she slowed her speed to the lowest point, and proceeded, having two lookouts stationed forward, running by compass

till opposite the Grand St. Ferry, whose lights they saw and whose bells they heard, and her master then commenced to turn her, taking a course which he thought would carry her pretty close to the piers below, but would clear them, and though at once stopping and backing when the lookout reported a vessel ahead, she ran into the vessel, which was lying alongside of a pier below the Hook.

*Held*, That this was not a case of inevitable accident.

That prudence, to say nothing of the State law, required the master to take such a course as would bring the steamboat into the middle of the river below the Hook, and the collision was occasioned by that error on his part. *The Bridgeport*, 65

8. A vessel cannot be discharged from all the liens arising out of a collision, on the petition of her owners in a suit against her by one lienholder, by virtue of the Act of Congress of March 3, 1851, but may be discharged from them on her owners giving a stipulation on notice in the full value of the vessel. *The City of Norwich*, 89

9. After decree against a steamer in a suit brought by the owners of a schooner which she had sunk, evidence, that the claims arising out of the collision exceed the value of the steamer and her freight, will not be received, nor will the final decree be delayed to enable the owners of the steamer to take "appropriate proceedings" to apportion the sum, for which they may be liable, among the parties that are entitled to it, under the Act of March 3, 1851. *Wright v. The Norwich & New York Transportation Co.* 156

10. Where a steamer going to sea through a crowded harbor, chose a passage between two vessels at anchor, and seeing a schooner crossing the passage, at once starboarded her helm to go under the schooner's stern if possible, and slowed and stopped her engine, and the schooner, which had not kept a good lookout, on seeing the steamer as she passed by the vessel which was anchored off the steamer's port bow, luffed a little, and then kept

off immediately, and the steamer struck the schooner near her foremast and sunk her,

*Held*, That the steamer had no right of way out to sea through the passage in question.

That, though the steamer did all she could after undertaking the passage, she was in fault for not stopping sooner. Having kept on and placed herself in a position involving danger of collision, and well calculated to excite alarm, she must be held responsible for the consequences.

That the schooner's luff did not appear to have prevented her from passing the steamer's track, but if it did, being a movement made in *extremis*, and under the alarm caused by the near approach of the steamer, it was no ground for holding her chargeable.

That if the court could see that the careless watch on the schooner had contributed to the collision, she would have been held in fault; but with a good lookout she would have been bound to hold the course she did till the luff, and the luff, if it was a false manœuvre, was not caused by the want of a lookout, but by the dangerous attitude of the steamer. *The City of Paris*, 174

11. Where a bark in tow of a steaming tug was injured by a collision with a ferry-boat, on a clear day, the vessels having seen each other at abundant distance to have avoided each other, and the testimony was in conflict; but the man at the wheel of the bark was not called, nor his absence accounted for, while the man in charge of the tug testified that the ferry-boat did not stop, though under full headway, till she was within ten feet of the bark, and then did not reverse her engine,

*Held*, That such a collision must have been the result of carelessness.

That the statement of the man from the tug must be incorrect; such a blow would have produced far other injuries, and the statement is a case of gross exaggeration.

That such a tendency to misdescribe, causes mistrust in the libellant's case; and a decree will not be rendered in his favor on such testimony. *The New York*, 211

12. Where a steamer and schooner meeting each other in Chesapeake Bay, the schooner bound down the bay with a free wind, but, as she claimed, holding her course, and her course being to westward of that of the steamer, and the steamer, as the vessels approached, put her wheel hard aport and stopped and backed, but a collision occurred.

*Held*, That it is the duty of steamers to give way to sailing vessels with a free wind, as well as to those close hauled.

That the vessels having seen each other several miles apart, the collision could only have occurred by gross fault on the part of one or both.

That the claim of the steamer that she stopped and backed when the schooner was nearly a mile off, bordered on absurdity.

That her claim that the schooner when nearly a mile to the westward of the steamer, and nearly abreast of her, suddenly starboarded and went to the eastward to cross the steamer's bows, was also unreasonable.

That the court was therefore compelled to discard the steamer's theory and accept that of the schooner, which was simple and consistent, with one exception.

That if the schooner was to the westward, and changed her course, as alleged by the steamer, then the order to stop and back the steamer was an error, and that on the other hand, if the schooner was nearly ahead, then the steamer should have starboarded instead of putting her helm hard aport. *The Carroll*, 286

### 8. SAILING VESSELS.

13. Two sailing vessels, a bark and a ship came in collision in the night, ten or fifteen miles S. E. of Sandy Hook. Both were close hauled, the bark being on her port tack, and though a light could have been seen at a distance of more than a mile, the ship's lights were not seen till the green light was seen within a quarter of a mile off. The bark was under short sail, so that she could not tack, but only wear ship, and she did not change her course after discovering the light, till the collision.

The ship saw the bark's green light ten or twelve minutes before the

collision. She was on her starboard tack, and did not change her course till the collision. Her lookout, after reporting the light, went aft. The pilot, who was in charge of her, testified that he saw the bark's green light and then her red light, and he then went to the weather side to see if there were any vessels on that side, and when he came back, the green light was again in view, and it was too late to avoid a collision. The other hands on the ship testified that they saw the lights and their changes, but with slight variations. The ship made no change of her course, and struck the bark fourteen or fifteen feet from her stern, in such a way that a slight starboard movement of the ship's wheel would have avoided the collision.

*Held*, That the bark was in fault for not seeing the light of the ship sooner. Being on ground where vessels are numerous and there is great danger of collision, being under short sail and not able to answer her helm promptly, and being on the port tack, it was her duty to exercise unremitting vigilance in looking out for approaching lights. If she had done so she would have seen the light sooner, and could have kept out of the way.

That it was the duty of the bark having the wind on her port side, to keep out of the way of the ship, which was crossing her track so as to involve risk of collision.

That she gave no sufficient excuse for not doing this.

That the lookout of the ship was remiss in leaving his post after reporting the light, and that the pilot in charge was also remiss in going to look out for other vessels.

That every vessel is bound to avoid a collision if she can, and the fault of one approaching vessel does not authorize another to run her down.

That after the change in the bark's lights had occurred, which was alleged to have been seen from the ship, and the green light of the bark was alone visible, the ship might have hove her wheel to starboard and avoided the collision, and as it was clear that the only way of escape for her was to starboard her wheel, and,

if she had done it, no collision would have occurred, she also must be held in fault for not having done so, and the damages must be apportioned. *The Havre and The Scotland*, 295

14. Where a British schooner bound to New York, close-hauled on the wind, met an American brig bound out, with the wind free, and kept her course till a collision was imminent, when she ported her helm, but did not avoid the collision; the schooner not having the lights required by the British Merchants' Shipping Act, and the collision having taken place before the passage of the Act of Congress respecting lights on vessels at sea,

*Held*, That it was the duty of the brig to keep out of the way, and of the schooner to hold her course.

That the court will not stop to inquire whether some other manoeuvre on the part of the schooner than porting might have proved more successful. The error of a vessel which has been brought into immediate jeopardy by the fault of another will not subject her to damages or prevent her recovery.

That there is no proof that the failure of the schooner to carry the lights required by the British Merchants' Shipping Act misled the brig, or in any way contributed to the disaster.

That that Act had no application to the equipment or conduct of this British schooner when meeting a foreign ship on the high seas.

Whether it would have an application to collisions between British and American vessels since the passage of the Act of Congress on the same subject—*quære!* *The Belle*, 817

15. A Dutch Schooner and a Russian bark came in collision in the North sea. The owners of the schooner libelled the bark.

*Held*, That the court had jurisdiction of the action. *The Jupiter*, 536

16. Both vessels being close-hauled it was the duty of the bark which was on the port tack to give way.

It was not a fault in the schooner that she luffed when she did, for she had the right to assume that the bark

would port, which she did do, when too late; but, for an act done under the circumstances in question, even if it had not been judicious, the schooner would not be responsible as for a fault, because it was done in a moment of peril, into which she had been brought by the fault of the bark.

The bark was in fault in not keeping a vigilant lookout. *id.*

### COMMISSION.

Where a commission was issued by a judge in Cuba to the Spanish consul in New York to take testimony to be used in a criminal prosecution for swindling, and the consul thereupon applied to the District Court for a summons to compel the witness to appear and testify,

*Held*, That the only provisions made by Congress on the subject of enforcing the giving of testimony in judicial proceedings pending in a foreign country, are found in the acts of March 2d, 1855 (10 *Stats. at Large*, 630), and of March 8d, 1863 (12 *Id.* 769).

That neither of those acts applied to this case, and the court had no power to issue the summons asked for. *The Spanish Consul's Petition*, 225

See PRACTICE IN ADMIRALTY, 26.

### CORPORATION.

Property of a foreign corporation may be attached in a suit in admiralty. *Atkins v. The Fibre Disintegrating Co.*, 118

### COSTS.

Costs in salvage cases may be divided among the different interests, and costs of but one libel should be allowed. *The Charles Henry*, 8

Where alcohol was seized in an unlocked shed by an internal revenue collector, and on a libel being filed, was seized by the marshal, and after a delay of many months was bonded by consent of all parties, the claimant consenting to pay the fees and expenses of the marshal, and the clerk taxed \$2.50 a day for keeper's fees from the date of the seizure, and an item for cartage and storage, and another for premiums of insurance paid by the marshal on a monthly policy which valued the alcohol at its

market value, tax paid; and an appeal was taken from the clerk's taxation of these items,

*Held*, That the sum actually paid a keeper to watch property in custody, not exceeding \$2.50 a day, may be taxed, upon satisfactory proof (1) that a prudent precaution in regard to all concerned in the property justified the marshal in placing a keeper over it; and (2) that the keeper actually continued in charge of it for the time specified, and that the sum charged has been actually paid by the marshal.

That on the facts the items for cartage and storage was justified by the situation of the property, and the marshal's responsibility for the property seized by him was not affected by the fact that a collector of another district claimed that the property had been in his possession under entry for deposit in a United States bonded warehouse.

That the objection to the item of insurance, because the policy was monthly instead of yearly, cannot prevail, the claimant being shown to have been informed of the form of the policy.

That the marshal would not have been justified in insuring this property as if it were in bond. He could only treat it as property belonging to the United States, and insure it at its full value.

That under the consent to pay the marshal's expenses, it could not be claimed that this part of his expenses should be stricken out as chargeable to the United States alone. *300 Barrels of Alcohol*, 72

The considerations which affect the award in salvage cases, affect the question of costs. *The Joseph C. Griggs and her cargo*, 81

Where the log of a vessel, as produced in court, had plainly been tampered with, by her master or mate or both, the master being part owner and the mate his brother,

*Held*, That the court would mark its disapproval of such misconduct by condemning the vessel to pay the costs of an action, the decree in which was in her favor. *The Anastasia*, 166  
Where, at the first meeting of a bank-

rupt's creditors, notice was given on behalf of a creditor, of an application to be made next day for an order for the examination of the petitioner, and the application was made pursuant to notice, whereupon the register proposed to grant the order on payment by the creditor of one dollar as his fee,

*Held*, That the proposed fee to the register is not provided for by the Act, nor by the General Orders in Bankruptcy, unless it is covered by the words in rule 30, "For every order made where notice is required to be given, &c."

That these words apply to cases where previous notice is required to be given to an adverse party of the application for the order, before the order can be made. *MacIntire's Case*, 277

See PRACTICE IN ADMIRALTY, 23.

PRACTICE IN BANKRUPTCY, 25.  
SALVAGE, 1.

## D

### DAMAGES.

1. Where an undue delay took place in the delivery of a case of goods, and during the delay the season for selling the goods to the trade ceased, and the goods were thereby diminished in value,

*Held*, That the vessel was chargeable with the damage occasioned by the delay, and that the diminution in value was properly chargeable as an item of damage. *The City of Dublin*, 46

2. The freight which a vessel, injured in a collision, was earning and has lost, is allowable as an item of damage; but this must be net freight; and there must be deducted from the gross freight the expenses the vessel would have incurred if the voyage had been successfully performed, and which would have diminished by so much the gross freight. *The Heroine*, 226
3. Where British sovereigns were shipped on freight under a bill of lading, and were not delivered,

*Held*, That the value of the sovereigns in the port of delivery might be recovered by the holder of the bill.

That that value was to be estimated in the currency of the country in which the port of delivery was situated and where the suit was brought, it not having been otherwise stipulated in the contract itself.

That the Legal Tender Act (12 *Stat. at Large*, p. 532) and the decisions under it had no application.

That the libellant was entitled to recover interest on his damages at seven per cent. *The Patrick Henry*, 292

4. Where cargo was cast into the water by the breaking down of a pier, and the ship owner sued the consignee for freight, who recouped the damages to the cargo:

*Held*, That the injury to the cargo, and the expense incurred in recovering it from the water, were proper items of such damage. *Kennedy v. Dodge*, 311

#### DELIVERY OF CARGO.

1. Where a case, containing braid, &c., for the manufacture of ladies' hats, was shipped on a steamer, but was not delivered to the consignee for nearly a month, notwithstanding his repeated demand of it, having been sent to a public store as a case without marks, and it appeared that the outside covering, which was properly marked, by some means was removed from the case while in custody of the ship, and the case itself was not marked, but the delivery clerk saw a loose covering on the wharf, and, when the consignee applied for the case, knew that a case had been sent to public store, which he was satisfied was the case applied for, but did not communicate the fact to the consignee,

*Held*, That on the evidence the delay in the delivery was attributable to negligence on the part of the vessel.

That on the evidence it was not negligence to have no marks on the case itself. *The City of Dublin*, 46

2. Where a charterer had men and carts at a dock on a specified day to receive a cargo of wood, but the vessel did not arrive till two days after, and then the master, without notice to the charterer, discharged the cargo, and

employed persons to cart it from the side of the vessel up the wharf and there to pile it,

*Held*, That the master could not throw upon the charterer this additional expense, without having first notified him of his intention to land and remove the cargo at the charterer's expense. *The Cargo of the Mary E. Taber*, 105

8. With regard to cargoes arriving at this port under ordinary bills of lading from foreign countries, landing them at a proper time, and upon a proper dock, with notice to the owners, is equivalent to a delivery.

After such landing and notice, the owner takes all the risks arising from every cause, except that which proceeds from the ship herself.

A notice to the consignees of the landing of cargo is not a notice against the wrongful act of the ship in overloading the pier, or against a defective pier. *Kennedy v. Dodge*, 311

#### DEMURRAGE.

Where a charter-party specified that the charterer should pay demurrage for detention of the vessel, "provided such detention shall happen by default" of the charterer, and the master having delivered his deck load at one dock, was required by the charterer to deliver the rest at another (which was according to the custom of the trade), and lost several days in getting there by reason of the weather:

*Held*, That no demurrage could be recovered under the charter for such detention, nor for Sundays. *The Cargo of the Mary E. Taber*, 105

#### DRAFTS.

Where drafts were given for supplies furnished to a vessel, and were not paid, and the material man libelled the vessel, and on the trial surrendered the drafts in court, the fact that one of the drafts was not due when the libel was filed was not allowed to reduce the libellant's recovery. *The James Guy*, 112

See PRACTICE IN BANKRUPTCY, 15.

## E

## EVIDENCE.

1. In a collision case, evidence of persons skilled in navigation, but not concerned with the navigation of the vessel, is entitled to great weight on a question of judgment. *The Favorita*, 30
2. In a collision case, testimony of men as to their own acts outweighs the statements of men on the other vessel as to those acts. *The Empire State*, 57
3. Evidence of conversations with the crew of a vessel injured in a collision is entitled to little weight in determining disputed questions of fact, especially where the evidence is contradicted by the crew themselves, and the statement is inconsistent with the cotemporary act of demanding pay for their vessel. *id.*
4. In a conflict of positive statements the surrounding circumstances become of great importance. *The Anchors, &c., of the D'Alberti*, 77
5. Where the log of a vessel, as produced in court, had plainly been tampered with by the master or mate, or both—the master being part owner, and the mate his brother,  
*Held*, That such a circumstance might well justify a court in rejecting without ceremony not only the log, but also the evidence of the persons who attempted to impose it upon the court. *The Anastasia*, 166
6. Where in a suit brought to forfeit wines for undervaluation it appeared that invoices, purporting to have been signed by one of the claimants, and showing the consul's certificate attached that the subscriber was what he represented himself to be, had passed in due course of business through the hands of a deputy collector, he was held competent to prove the signature upon certain invoices to be that of the claimants, though he had never seen them write.  
The appraisement in court of the goods for the purposes of bonding is not evidence of market value.  
Evidence of isolated transactions in similar wines in New York is not competent evidence on the question of market value.

Letters of other wine manufacturers than the claimants, as to their own wines, held admissible as evidence on the question of market value, provided the wines were substantially of the same grade and quality as those in suit. *8,109 Cases of Champagne*, 241

7. Very little reliance can be placed upon the testimony of a witness who has contradicted himself on cross-examination, whether the discrepancies arose from forgetfulness, disingenuousness, or dullness. *The Carroll*, 286
  8. A libellant, a Chinaman, was offered as a witness in his own behalf, and was sworn in the usual way. Objection was made, on behalf of the claimants, that the oath thus taken was not binding upon him. The court directed the claimants to examine him on that point. He stated that he did not know the name of the book that he was sworn on, but that, if he should say anything that was not true, the court would punish him, and after he was dead he should "go down there," making an emphatic gesture downward with his hand,  
*Held*, That a witness must be sworn in such a way as was binding on his conscience.  
That the libellant might be examined on the oath which he had taken. *The Merrimac*, 490
- See COLLISION*, 3, 6.  
*COMMISSION*.  
*LIEN*, 3.  
*MINOR*, 1, 2, 3.  
*PRACTICE IN ADMIRALTY*, 22.

## F

## FREIGHT.

Where cargo was shipped in Melbourne to be delivered in New York on payment of £2 freight, and the cargo not being delivered, the holder of the bill of lading sued the ship to recover its value,  
*Held*, That though no freight was strictly earned, as the contract was not fulfilled, yet admiralty courts have power to do substantial justice, which in this case was to make the libellant good for his loss, charging him with the freight.



That the stipulation for freight was a promise to pay money, and the freight must be reckoned in currency according to our laws, which fix the legal value of the pound sterling in commercial transactions at \$4.44. *The Patrick Henry*, 292

See DAMAGES, 2.

## H

### HABEAS CORPUS.

Where a person, confined in prison in Philadelphia, was brought to New York in charge of an officer, under a writ of *habeas corpus ad testificandum*, issued out of the U.S. District Court, and, after his arrival, applied to a State court and obtained a writ of *habeas corpus*, under the operation of which he was discharged by the State court from the custody of the officer, who returned to Philadelphia without him,

*Held*, That, as he was brought from Philadelphia under the writ issued by this court, and was still actually present before this court, he was still under its control, and must be sent back to the place from which he was brought for the purpose of testifying, and that, as his proper guardian had left him, he must be returned there by the marshal of this district.

Where a person, arrested as a deserter from the military service, was brought up under a writ of *habeas corpus* issued by this court, and the military authorities made return that he was regularly enlisted into the military service of the United States, which return the petitioner traversed, and, on the traverse, evidence was taken as to the identity of the petitioner with the person enlisted,

*Held*, That, on the proofs, the petitioner was the person enlisted, and that, as he was regularly enlisted, he must be remanded. *Hamilton's Case*, 455

See MINOR.

## I

### IMPORT ACTS.

Where wines imported into this country, from Rheims, in France, were claimed to be forfeited to the Government for

alleged fraudulent undervaluation in the invoices,

*Held*, That the "place" where the goods were procured or manufactured, as specified in the first section of the Act of March 3d, 1863, was not Rheims but France.

That if there was a market value there, and the invoices were knowingly made out at a lower rate, the wines must be forfeited.

That if the invoices were made up with an intent, by false valuation, to evade or defraud the revenue, a similar result should follow.

That where probable cause is shown by the prosecution in such a case, which probable cause is to be judged of by the court, the burden is on the claimant to show his innocence. 3,109 *Cases of Champagne*, 241

See PRACTICE IN ADMIRALTY, 19.

### INFORMER.

1. Under the Revenue laws, the right of an informer becomes vested only when the money representing the forfeited property is paid over and is ready for distribution; until then his right is liable to be divested by the act of the Government. § 9 of the Act of July 13th, 1866, as to the time when the informer's right becomes vested, is merely declaratory of the law. *About 25,000 Gallons of Spirits*, 867

2. Where a proceeding was commenced to forfeit property under the Internal Revenue laws, and the claimant consented to its condemnation, the value of certain portions being paid into court and those portions released, and a decree of forfeiture against the whole was entered, and that decree was set aside by the court, on application of the claimant, and he came in to defend, but, at a subsequent date, a decree of forfeiture was again entered, under which the property in custody was sold, and its proceeds, together with the amount previously paid in, were held for distribution, and the informer claimed to be entitled to share according to the provisions of the law existing at the time he gave the information:

*Held*, That the court had the right to set aside the first decree, without the informer's consent.

That the money paid into court was never ready for distribution until the second decree of forfeiture.

That the amount of the informer's share must be determined by the law as it stood at the time of the final decree of forfeiture, and not as it stood at the time of the first decree. *id.* 867

3. Under § 179 of the Internal Revenue Act of June 30th, 1864, as amended by the Act of July 18th, 1866, and the regulations of the Secretary of the Treasury of August 4th, 1866, the amount of an informer's per centage is to be calculated upon the gross proceeds of the forfeiture, without deducting the costs. *One Still, Boiler, &c.,* 874

4. Under that section, where the marshal sells forfeited property under a *venditioni exponas*, the informer becomes entitled to his share when the proceeds are paid to the marshal, and his share is to be determined by the regulations then in force. *Eight Barrels of Distilled Spirits, &c.,* 472

#### INTERNAL REVENUE ACT.

1. Property proceeded against under the Internal Revenue Acts of June 30, 1864, and March 3, 1865, being under seizure by the marshal, the claimant applied for leave to bond it.

*Held*, that the Court had power to discharge the property upon bail under the 48th and 50th sections of the Revenue Act of June 30, 1864. 300  
*Barrels of Whisky,* 15

2. Under the ninth section of the Act of July 18th, 1866, the expenses of watching property seized by a collector, for such time as should necessarily elapse between that seizure and the seizure by the marshal under process, may be taxed, but the rate cannot be greater than that allowed to the marshal, unless under special circumstances, and in this case twenty-four hours was all the time necessary. *Fifteen Empty Barrels,* 125

See INFORMER, 1, 2, 3 and 4.

## J

#### JURISDICTION.

1. An Admiralty Court has no jurisdiction over the "appropriate proceedings," to apportion the value of a vessel which has caused a collision, among the parties who have suffered loss thereby, which are provided for by the fourth section of the Act of Congress of March 3d, 1851. *The City of Norwich,* 89

2. The District Court of the United States has no such jurisdiction. *Wright v. The Norwich and New York Transportation Co.,* 156

3. Where a libel was filed to recover for stevedore's services, and exceptions were filed to it on the ground that the services were not maritime, and therefore the claim was not within the jurisdiction,

*Held*, That though the court would be disposed, if the question were a new one, to hold that such services were maritime, yet as the question had been repeatedly determined otherwise in the Southern District, the law of those decisions would be followed until modified by concurrent action on the part of both courts, or by the Circuit Court on appeal. *The Circassian,* 209

4. A libel was filed by a seaman to recover wages against a ship and freight money. The marshal made return to the process, that he had not attached the vessel, but had attached the freight money in the hands of parties who held it. Prior to the service of the process, a suit had been commenced in a State court against the owners of the vessel, in which warrants of attachment had been issued, under which the State sheriff had seized the vessel. He held her under those attachments when the marshal came to seize her. He had also served copies of the warrants upon the parties who held the freight money, with notice that he attached it. On this state of facts,

*Held*, That seamen have a paramount lien for their wages upon the freight money of the voyage, and that

such lien is to be administered by a court of admiralty, by the service of its attachment upon the freight money, in the hands of the parties where it is found.

That, as against a lien of this character, the principle established by the Supreme Court of the United States, in the case of *Taylor v. Carryl* (20 How. 488), ought not to be extended.

That the application of the principle of that case to an attachment issuing from a State court against a vessel, would only work delay in the enforcement of a sailor's lien for wages upon her, but that the application of it to an attachment against freight money would work the entire destruction of the lien.

That the possession of the freight money by the sheriff, constructive or otherwise, was not such as the possession of the vessel in *Taylor v. Carryl*, or such as prevented the marshal from levying his process upon it, so as to give this court jurisdiction of it *in rem*.

That the jurisdiction of this court is therefore sustained. *The Sailor Prince*, 284

5. The court has no jurisdiction to enforce a State lien. *The Adèle*, 309

See COLLISION, 15.  
MORTGAGE, 3.

## L

### LIEN.

1. A lien on a vessel extends to every part of her, and the removal of her sails, before she is seized under process, does not free them from the lien. *The Geo. Prescott*, 1
2. The Act of Congress of March 3, 1851, does not authorize the discharging of a vessel from liens upon her created by law. *The City of Norwich*, 89
3. Where supplies were furnished in Baltimore to a vessel owned in New York, on the order of her owner, who was then present in Baltimore, the work being charged to the vessel on

the bills, for which the owner gave time drafts, which contained the words, "charge to the account of the steamer James Guy," and the owner was insolvent, and was known to be so at the place of his residence,

*Held*, That the circumstances showed that the work was done on the credit of the vessel.

That it was not necessary for the material man to show that the owner was without credit in Baltimore, in order to hold a lien on the vessel for the work.

That the character of the work and the fact that it was ordered by the owner, established that the work was necessary for the vessel.

That the responsibility of the boat for the bills was a feature in the transaction recognized by both parties at the time of contracting the debt.

That proof of the bankruptcy of the owner at the time is sufficient proof of the necessity for the credit to the vessel.

That the libellant, therefore, had a lien on the vessel for his work, unless he had waived it by taking the time drafts.

That the burden was on the claimant to prove that the libellant agreed to receive the drafts in place of the original claim.

That no such proof was furnished.

That the drafts being surrendered in court, the fact that one of them was not due when the libel was filed could not avail to reduce the libellant's claim. *The James Guy*, 112

4. The law that there is no lien on a vessel for stevedore's services, is settled for this court, until overruled by a higher court. *The Circassian*, 209
5. Seamen have a paramount lien for their wages upon the freight money. *The Sailor Prince*, 284
6. The principle that, where one creditor has two funds to resort to, while another creditor has a security on only one of such funds, the court will compel the former to resort to the other fund, if that is necessary for the satisfaction of both claims, is sometimes applied in the Admiralty. *The Sailor Prince*, 461

## M

## MARITIME LAW.

The interests of commerce require uniformity in the maritime law, as administered in the maritime courts of all countries. *The Freight Money of the Anastasia*, 188

## MARKET VALUE.

The "actual market value" spoken of in the statute of March 3, 1863, is the price which the owner or producer of the goods is willing to receive for them, if they are sold in the ordinary course of trade—the price which a purchaser must pay to get them.

If merchants held wines for sale at Rheims in France, and named the prices at which they would sell them, and below which they would not sell them, then, in judgment of law, there was a market for the wines there, and the market price was the price so fixed by them.

If wine, the same in all substantial particulars as to grade, quality, and body and marketable worth, appreciation and value, as wine which had been imported from Rheims, was sold in the market at Rheims, then there was a market value for the imported wine in Rheims.

If merchants, thinking that a certain letter to them contained a regular mercantile proposition, in answer fixed certain prices as the lowest cash prices, for export, for their wines in quantities, and the wines referred to were in substance the same as the wines imported, a jury might infer that the merchant would have sold the same wines to any one at those prices, and that those prices were the market value.

If there was such market value for the wines, and the invoices on importation were knowingly made at a lower rate, the wines should be forfeited. 3,109 *Cases of Champagne*, 241

See DAMAGES, 1.  
EVIDENCE, 6.

## MARSHAL.

A vessel was seized by a State sheriff under a State lien law. Afterward, process was issued against her in the

United States District Court, in a suit on a bottomry bond. The proceedings in the State court having gone to a sale, the purchaser, who had paid twenty per cent. of the purchase money, but had not completed the purchase, applied to the District Court for an order directing the marshal to surrender the vessel to him.

*Held*, That the purchaser was not in a position to ask such an order, having bought her with full knowledge of the admiralty proceedings, not having completed his purchase, and not averring that the sheriff could not or would not put him in possession on his completing the purchase. *The Circassian*, 128

A marshal is responsible for the execution of process put into his hands, and should be left free to state what he does with it, subject to that responsibility. *id.*

A marshal's return to process against a vessel, stating a seizure of her, but that she was in custody of a State sheriff, does not imply such a seizure as would make the marshal responsible, or give the court jurisdiction. *id.*

See HABEAS CORPUS.

## MASTER.

1. A master who held a mortgage on his vessel, and who removed the sails, before she was sold under a *venditioni exponas*, and sold them, was, on the application of one of several libellants having decrees against the vessel, which the proceeds realized by the sale were not sufficient to satisfy, ordered to pay the proceeds of the sails into court to meet such claims as were valid liens on the vessel. *The Geo. Prescott*, 1
2. The responsibility thrown upon the master and his rank are to be considered in fixing his share of salvage. *The Charles Henry and Cargo*, 8
3. Where a pier was broken down by cargo discharged upon it,

*Held*, That the master of the ship was clearly liable for the damage to the cargo, for it was by his act, in overloading the pier, that the goods were injured.

That that act of his was not malicious or intentional, but was committed in the ordinary discharge of his duties as master, and within the scope of his powers as the agent of the owners, and that the ship was liable therefor.

That whether the master had reason to suppose that the pier was unsafe or not, was not material. *Kennedy v. Dodge*, 311

See PRACTICE IN ADMIRALTY, 22.  
CHARTER PARTY.  
SEAMEN'S WAGES, 4.

### MINOR.

1. Under the Act of Congress of February 18th, 1862, the oath of a military recruit, in his enlistment papers, as to his age, is conclusive upon himself and upon this court, and where he has sworn that he was not a minor, evidence to show that he was such is not admissible.

Where the oath is taken before a military officer, the presumption is that the services of a civil magistrate could not be obtained, as required by the Act of June 12th, 1858, § 3, and the burden of proof is on the recruit, to show that such services could be obtained. *Cline's Case*, 338

2. On a *habeas corpus* to inquire into the enlistment of an alleged minor, who had sworn, on his enlistment, that he was twenty-one years of age and upwards, evidence may be given as to whether he understood what he was swearing to. *Stokes' Case*, 341

3. The oath taken by a recruit, on his enlistment into the army of the United States, as to his age, is conclusive as against himself and every one else.

Enlistments of minors over eighteen years of age, into the army of the United States, without the consent of their parents, masters or guardians, are valid, but it is not lawful to muster into the service a person under eighteen years of age. *Riley's Case*, 408

4. The whole power of discharging minors from the army is given to the Secretary of War, and cognizance of such matters is taken from the courts. *id.*

See PRACTICE IN ADMIRALTY, 18.

### MORTGAGE.

1. One who holds a mortgage on a vessel has no right to remove her sails so that they cannot be seized by the marshal who has process against her. *The Geo. Prescott*, 1
2. A mate of a vessel who had loaned money to the master on an agreement to divide all profit and loss as if he were part owner, instead of receiving interest, was held to be a mortgagee. *The Blohm*, 228
3. The admiralty has no jurisdiction to enforce the claim of a mortgagee of a vessel, and a libel by a mortgagee against the proceeds of the vessel, cannot be maintained.

The court has no authority to adjudicate upon a title to mortgages on a vessel which is contested; and the allegation, that, prior to the attachment of the vessel, the mortgagee had taken possession of her, does not affect the question. *The Sailor Prince*, 461

### 0

### OWNER.

1. Owners of a vessel which has caused a collision cannot, on petition in an action against the vessel in *rem*, brought by one of several parties who have been damaged by the collision, be discharged from their personal liability on giving a stipulation under the Act of Congress of March 3, 1851. *The City of Norwich*, 89
2. Proof, that the owner of a vessel for which supplies are procured was then bankrupt, establishes the necessity of the credit of the vessel in order to procure them. *The James Guy*, 112
3. The liability of owners of vessels for damages done by their own to other craft in cases of collision, is limited, by the third section of the Act of March 3, 1851, to the amount and value of their interest in the vessel at fault and her pending freight.

This limitation of liability is not confined to damages done to property on board the faulty vessel, but embraces all damages. *Wright v. The New York Transportation Co.* 156

See PRACTICE IN ADMIRALTY, 21.

## P

## PLEADING.

1. A canal-boat in tow of a steamboat was injured in a collision with another steamboat. The owner of her filed a libel against both vessels, in which he did not set out the facts of the collision, though the movements of the vessels were seen by a person on board the canal-boat. The claimants excepted to the libel.

*Held*, That exceptions to a pleading in Admiralty have the effect of a demurrer, and also that of a motion to make the pleading more definite and certain.

That to make cases of collisions like this exceptions to the general rule, which requires a full statement of the facts of the collision, would be to permit the parties to come to trial without any preliminary statement from either party, which would be of any assistance to the court, or would apprise the parties most in interest, of the facts which they are called on to meet.

Whether such exceptional pleading might be allowed where the libellant was unable to give any statement of the facts of the collision—*quere*.

That the present was not such a case, and the libel must be reformed by setting forth as far as practicable, the material circumstances attending the collision in question. *The Transport and the W. E. Cheney*, 86

2. The libel and answer should set out clearly and explicitly, though briefly, the facts relied on, and in collision cases this is especially important.

The court has the power, in any stage of the case, to require the parties to supply any defect in the pleadings, though counsel can appeal to the court for that purpose, only by exceptions filed at the proper time. *The Havre and the Scotland*, 295

3. In a suit brought in behalf of a vessel in tow to recover the damages sustained by her in a collision with another vessel.

*Held*, That the fact that the libel did not specify the want of proper lights

on the tug as an element in her negligence made no difference, there being no dispute as to what lights the tug had, and no surprise upon her as to the evidence given about her lights. That, if desired, an amendment of the libel to that effect would be allowed. *The Alabama and the Gamecock*, 476

## POWER OF ATTORNEY.

The mere fact that a power of attorney was given before the passage of the Bankruptcy Act is not enough to show that it did not confer the necessary power upon the attorney in fact to appoint an attorney at law to act for his principals in a bankruptcy proceeding. Whether it gave that power depended upon its language. *Knoepfel's Case*, 398

The signing of the names of the principals to a paper, drawn according to form No. 15 in Bankruptcy, choosing an assignee of the estate of a debtor to the principals, was the signing of a paper which was proper for the purpose of collecting the debt due to the principals, and a power authorizing the attorney to collect debts, and to sign any paper necessary for that purpose, gave to the attorney, or his duly appointed substitute, authority to act for the principal in the matter in question. *id*

## POWER OF THE COURT.

1. The United States District Court has power, independent of any statute, to discharge upon bail property in custody, in cases of seizure under the Import acts, whether upon land or water, and under the Internal Revenue acts. *300 Barrels of Whiskey*, 15

2. The power to bond property is one of the inherent powers of the court. *The City of Norwich*, 89

3. The power to attach the property of absent defendants, to compel an appearance, has always been recognized as within "the course of the Admiralty," and the intention to withdraw it or to limit its power will not be inferred from the use of the words "civil suit" in the 11th section of the Judi-

ciary Act. *Atkins v. The Fibre Disintegrating Co.*, 118

4. When one court of competent jurisdiction has custody of property, no other court of concurrent jurisdiction can acquire jurisdiction of it. *The Circassian*, 128
5. The United States District Court has no power to issue a summons to compel a witness to appear and be examined under a commission issued in a criminal proceeding in Cuba. *The Spanish Consul's Petition*, 225
6. That court has power, under § 4 of the Bankruptcy Act, and General Orders 5 and 7, to allow amendments of schedules in bankruptcy. *Morford's Case*, 264
7. That court has the power in any stage of the case to require the parties to supply any defect in the pleadings. *The Havre and The Scotland*, 295
8. That court has power to release on *habeas corpus*, under the act of February 5th, 1867, any one held by a State court in violation of any law of the United States. *Seymour's Case*, 348

See BANKRUPTCY PRACTICE, 14.  
INFORMER, 2.  
INTERNAL REVENUE, 1.  
MINOR, 4.  
PRACTICE IN ADMIRALTY, 25.

# PRACTICE IN ADMIRALTY.

1. Where a vessel had been sold on a *venditioni exponas*, for less than enough to pay the claims against her, and one of the libellants alleged that her master and one Smith had stripped her of her sails before she was sold, a monition was issued to them to show cause why they should not produce the sails. *The Geo, Prescott*, 1
2. On the return to the monition, the master showed that he had sold the sails, and claimed to hold the proceeds under a mortgage on the vessel. He was ordered to pay the proceeds into court to meet whatever liens were on the vessel. *id.*

3. A default in favor of seamen not opened, where it appeared that their wages had not been paid. *id.*

4. As it appeared that the vessel was sold under the *venditioni exponas* for a full price, excluding her sails, the court refused to set aside the sale. *id.*

5. Where several libels are filed against a vessel, and no owner appears on return of process, it is regular for each libellant to reserve the right to contest the demands of the others. *id.*

6. But one libel should be filed in ordinary salvage cases. *The Charles Henry and Cargo*, 8

7. Where a vessel and cargo were libelled for salvage, and bonded in their full value, and thereafter the owners of the cargo filed a libel against the vessel, claiming to recover the damages occasioned to the cargo by the disaster out of which the salvage claim arose, to an amount equaling the value of the vessel, and thereupon, before this process was returned, the stipulators for value in the salvage case applied to have their stipulations canceled, and the vessel remanded to custody under the process in the salvage case.

*Held*, That the application was premature, and could not be entertained before the process was returned, and notice published as required by the rules.

Whether relief could be given in such a case,—*quere*. *The Empire*, 19

8. A motion by the defendant, to bond in a possessory action, is not ordinarily entertained on affidavits before issue joined.

Where no delay is likely to attend the disposal of such a case upon the merits, the reason for a delivery upon bail fails. *The Rainbow*, 40

9. The question whether Government property, on board a vessel chartered to the Government, on which a bottomry bond had been given, could be seized by the marshal, under process issued to enforce the bond, should be determined on issues, and not on motion. *The Othello and Cargo*. 48

10. Where a vessel which had met with a collision was libelled by a freighter of goods on board, and the owners filed a petition for leave to file a stipulation in the appraised value of the vessel and her freight, and that thereupon the vessel and her owners might be declared discharged from all liability for losses arising out of the collision, under the act of Congress of March 3, 1851;

The court ordered notice to be published for fourteen days, of the time and place of making the application for the order on the petition.

It held also, that the relief which the owners sought could not be obtained under that act, but that under the circumstances of the present case, a stipulation in the form tendered would protect all the rights of the lien creditors, and as effectually release the vessel from all the liens provided for in it, as the ordinary stipulation does from the claims made in the particular libel which that stipulation is intended to secure, and that therefore the application to bond the vessel in this way might be granted. *The City of Norwich*, 89

11. The "appropriate proceeding," spoken of in the 4th section of the Act of March 3, 1851, must be a proceeding *in personam*, where the parties to be affected are duly brought before the court, and in which a trial can be had on issues properly framed. *id.*
12. The question, whether the custody by a sheriff of a vessel, under a writ alleged to be void, is such as to prevent a court of admiralty from acquiring jurisdiction of the vessel, is one which should not be determined on motion. *The Circassian*, 128
13. The words "civil suit," in the eleventh section of the Judiciary Act of 1789, do not embrace admiralty proceedings.
- If they did, the Act of August 23, 1842, and the Supreme Court rules of 1845 must be held to have repealed that section as far as relates to admiralty proceedings.

An attachment against the property of a foreign corporation is valid. *Atkins v. The Fibre Disintegrating Co.*, 118

14. Where a marshal who had process against a vessel, made return that he had attached her, but that previous to his attachment she was in custody of a State sheriff, and where it appeared that, of the warrants under which the sheriff held the vessel, all that were in his hands, at the time of the alleged attachment by the marshal, were afterwards declared void for want of jurisdiction, and the libellant thereupon applied for an order to compel the marshal to amend his return by striking out all reference to the custody of the sheriff,

*Held*, That the marshal is responsible for the execution of the process put into his hands, and should be left free to state what he does with it, subject to that responsibility, and that the court therefore would not interfere. *The Circassian*, 128

15. Where a question arose between the marshals of the Southern and Eastern Districts of New York, as to which made the first seizure of a vessel in waters over which both District courts exercise concurrent jurisdiction, and on a petition by one marshal to the court to have the other give up the custody of the vessel to him, the court heard evidence as to which seizure was prior,

*Held*, That such a question was more properly raised on a petition by the marshal, than on a plea to the jurisdiction by a party in whose favor the marshal held process.

That as long as one court of competent jurisdiction has custody of property, no other court of concurrent jurisdiction can acquire jurisdiction of it.

That the custody of the law, having been once fixed by the valid levy of an officer duly authorized to seize, continues whether the officer be present or not, unless acts equivalent to a surrender and withdrawal are shown.

That a marshal's return stating a seizure of the vessel, but that at that time the vessel was in custody of a State sheriff, does not imply any such seizure as would make the marshal responsible, or would give the court jurisdiction. *id.*



16. Where a libel was filed on a bottomry bond, on which process was issued and returned, and on the return a State sheriff filed a claim and answer, setting up that he was in custody of the vessel at the time of the alleged seizure by the marshal, and the libellant moved to strike out the claim,  
*Held*, That the power of the sheriff to bring, in this way, proceedings in a State court, before a United States court for adjudication as to their validity, is doubtful.  
That where a conflict of this sort arises between a sheriff and a marshal, the sheriff has two courses open to him, either to apply to the State court to be protected, or apply by petition to the Federal court to order its officer to withdraw.  
The sheriff's answer stricken out, and leave given him to apply by petition. *id.*
17. After decree against a vessel in a collision case, the final decree will not be stayed to enable her owners to take "appropriate proceedings" under the Act of March 3, 1851. *Wright v. The Norwich and New York Transportation Co.*, 156
18. Where a minor whose parents were both dead, and who had no guardian, and had for five years been providing for himself and making his own contracts, shipped on a vessel for a voyage which he performed, and on her return left the vessel with the assent of the master before the cargo was discharged, and before the ten days after such discharge was completed commenced proceedings to recover his wages, by taking out a summons before a United States Commissioner, on the return of which no one appeared, and the commissioner gave a certificate, and thereupon the libel was filed and process issued, whereupon the owners of the vessel moved to dismiss the libel on the ground that the libellant being a minor could not sue, but must bring his suit by guardian or next friend, and that the suit was prematurely brought, the ten days after the discharge of the vessel not having expired.  
*Held*, That the libellant's proceedings were regular. *The David Faust*, 183
19. Where goods which had been entered for warehouse were libelled by the United States as forfeited, and were attached by the marshal under the process while still in warehouse, and the owners filed a claim to them, and presented a petition to the court praying that the goods be appraised at their cash value, less the duties, that they might be bonded in accordance with the eighty-ninth section of the Act of March 2d, 1799 (1 *Stat. at Large*, 696);  
*Held*, That the practice of giving the bond in such cases, in the amount of the value of the property, less the duties, is correct, and will continue to be the practice of this court till overruled by superior authority. *Four Cases of Silk Ribbons*, 214
20. Where process was issued against freight money in a suit for seamen's wages, and the marshal returned that he had attached it in the hands of the parties who held it,  
*Held*, That that return was sufficient to give the court jurisdiction of it, though previously warrants of attachment against it had been served by a State sheriff. *The Sailor Prince*, 234
21. On the trial of a case of collision between a ship and a bark, objection was made on the part of the ship, that the libellant, who had libelled as owner of the bark, had failed to prove his title.  
*Held*, That proof of the title to the bark by her alleged owner might be given after the trial. *The Havre and the Scotland*, 295
22. Depositions of the crew of the ship were read, from which it appeared that when they were being taken, the proctor for the bark objected to the presence of the master of the ship, on the ground that his presence might exercise an undue influence over the witnesses, and the commissioner excluded him. To this exception was taken.  
*Held*, That the commissioner was in error in excluding the captain of the ship from being present at the taking of the depositions of his crew. It was not only his privilege but his duty to be there, especially as he was a stranger contesting his rights before a foreign tribunal. He should not have

been excluded unless his contumacy compelled that course. *id.*

23. Where several libels were filed against a ship which was sold, and application was made to the court to decree payment out of the proceeds,

*Held*, That the decrees should be paid in the order in which the libels were filed, each decree being paid with its costs until the fund was exhausted. *The Adele*, 808

24. Damages to cargo can be recouped in a suit for freight. But the respondents cannot have an affirmative decree in their favor, if that damage exceeds the freight. *Kennedy v. Dodge*, 311

25. Where a libel was dismissed by default in 1860, and the claimant, without notice to the libellant, entered an order, in 1861, canceling the stipulation for costs and the bond under the Act given on the discharge of the vessel, but thereafter agreed to open the default, and the cause was, in 1864, noticed for hearing by both parties, but, when it was called for hearing, the claimant's proctor stated that it had been dismissed, and thereupon the libellant's proctor moved to set aside the decree and the order of cancellation,

*Held*, That the claimant was regular in entering the order of cancellation without notice to the libellant, the libel having been dismissed by default.

That the claimant had, by his acts, waived the decree dismissing the libel and the order of cancellation.

That the court had power to vacate that decree and order, so as to hold the stipulators still liable on their stipulations. *The Antelope*, 343

26. Where a suit was commenced in September, 1857, and, in December, 1857, the cause being then at issue, the claimants procured an order for a commission to examine a witness, with a stay of proceedings till its return, and direct interrogatories were served in June, 1858, but no cross-interrogatories were ever served, and the commission was never sent, and the libellant died in May, 1859, and no further steps were taken by either party till October, 1867, when the libellant's executors applied to the court to be

substituted as libellants and to have the stay of proceedings set aside,

*Held*, That, as no time was fixed by statute within which executors must apply to be substituted, no laches could be predicated of the mere lapse of time, and inasmuch as the claimants could have at any time compelled the executors to be substituted, the claimants were as open to the charge of laches as the libellant, and the application to substitute the executors must be granted.

That, as the delay had arisen apparently from the fact that both parties understood that the suit was not to be further prosecuted, and as the witness to be examined under the commission was material, and was now in the East Indies, and a commission to examine him could not be executed in less than a year, the claimants were entitled to a continuance of the stay. *The Norway*, 493

27. Where several libels were filed against a vessel to recover claims, which amounted to more than the appraised value of the vessel,

*Held*, That she might be discharged, on the claimant's giving a stipulation, in the full value of the vessel, the same to stand in court for the benefit of all the libellants before the court.

That a married woman, though she justified in the required amount, would not be accepted as surety. *The Antelope*, 521

28. Where a libel was filed by the owners of a schooner, which was sunk in a collision, to recover further loss, and contained the allegation that it was filed "in behalf of the libellants and all parties having a common right of action arising out of the collision, who may intervene as co-libellants, or otherwise;" and, after a decree for libellants, and while the reference to ascertain the damages was pending, insurers, who had paid a loss on the cargo, applied to the court on petition to be made co-libellants,

*Held*, That, as no injustice would be caused to the claimants, the application would be granted, although the court saw no necessity for, or advantage in, the proceeding.

That a special reference must be

had, to take and report to the court the evidence produced by the petitioners to show their right to participate in the decree, and any evidence in opposition. *The City of Paris*, 529

## PRACTICE IN BANKRUPTCY.

1. Under § 4 of the Bankrupt Act, and rules 5 and 7 of the General Orders in Bankruptcy adopted by the Supreme Court, the court has the power to allow amendments of the schedules, and, for the purpose of allowing such amendments, where they are uncontested, the register is the court, and has power to allow them on a direct application to him.

The co-ordinate power of allowing them rests with the judge.

The original amendments permitted to be made should be filed with the clerk.

In making them, General Orders No. 14 and No. 33 should be observed.

When they are filed, the registers will act on them under General Order No. 7 and rule No. 4 of this Court in Bankruptcy. *Morford's Case*, 264

2. Where a firm composed of three persons did business in Cincinnati, Ohio, till April 18th, 1861, when it was dissolved, and in June, 1867, one of the partners filed his petition in this court, and was adjudged a bankrupt,

*Held*, That the other partners could present a petition praying that the partners which composed that firm be adjudged bankrupt, to the court which, under section eleven of the Act, had jurisdiction of such a petition, and, if the other partner should refuse to join in it, the eighteenth General Order would apply.

The thirty-sixth section of the Bankrupt Act applies only to a case where two or more persons, who are partners in trade, are adjudged bankrupt. *Boylan's Case*, 266

3. Where the register, to whom a petition had been referred, designated as the newspapers in which the notice to creditors should be published, two papers in New York city and two in other States, and the bankrupt objected to the designation of the papers

out of New York city, and the register certified that, in his opinion, such publication was necessary to protect the creditors in their rights,

*Held*, That the register has power in such a case to designate newspapers, in addition to those selected, under rule 5 of this Court, from those designated in rule 21, but cannot substitute other newspapers for those which he is required by rule 5 to select.

That, although, in this case, the majority in amount of the creditors resided in New York city, yet the majority in number resided elsewhere, and that the exercise by the register of his power to make such designation was proper. *Robinson's Case*, 270

4. A creditor who has proved his claim may, at any time thereafter, and before the expiration of the time limited by rule 24 of the General Orders in Bankruptcy, file specifications of the grounds of his opposition to a bankrupt's discharge.

That rule is enabling and not prohibitory.

The filing of such specifications is not a necessary prerequisite to the making of an order, under § 26 of the Bankruptcy Act, for the examination of the bankrupt, or of other persons. *Baum's Case*, 274

5. Under the 26th section of the Act, no notice is required to be given of an application to a register by a creditor for the examination of a bankrupt.

The examination is not a "meeting" under § 47 of the Act, that word in the Act always meaning a meeting of creditors. *MacIntire's Case*, 277

6. Where, at the first meeting of creditors, objections to the proceedings were filed, and the register declined to pass on them, but certified them to the court, and adjourned the proceedings,

*Held*, That the adjournment was regular. *Hill's Case*, 321

7. Until a bankrupt applies for his discharge, under section twenty-nine, no objection to any proceeding can be considered to be an opposition to the discharge.

A variance in the bankrupt's name in the notice served, held not material

The marshal's return as to such service is not conclusive.

A statement, in the schedule, of the sum due any creditor, and of the date of the debt or judgment, held sufficient. Any insufficient statement may be made sufficient by amendment.

Schedules giving an inventory of the bankrupt's personal estate, but failing to set forth the separate items, are defective, but may be amended.

No creditor has any right to be heard at the first meeting, either in person or by attorney, in opposition to any of the proceedings, till he has proved his debt.

The register's certificate, as to the correctness of the inventory of debts, is not conclusive.

A creditor who opposes a bankrupt's discharge, on the ground of fraud or concealment, must specify the particular matter of which he complains. *id.*

8. Where an attorney claimed to act for a firm at the first meeting of the creditors of a bankrupt, under a letter of attorney executed for the firm, all the members of which were in Europe, by one K. as attorney for the firm, but K's attorneyship was not proved by the oath of any witness, nor was any power of attorney to him produced, but he had verified the proof of debt, swearing that he was duly authorized to make the affidavit.

*Held*, That the authority of K. to give the letter of attorney was not sufficiently established to entitle the attorney to appear for the firm under the twenty-third section of the Bankruptcy Act. *Knoepfel's Case*. 380

9. Where all the creditors of a bankrupt resided in Germany, and the register fixed the first meeting of creditors at sixty days from the date of the warrant,

*Held*, That, under the eleventh section of the Bankruptcy Act, the fixing of the time for the first meeting is a matter of discretion with the register.

That ninety days' time is to be allowed in cases where the creditors live so far away as to make such an interval a reasonable time.

That there is nothing to show that the register did not exercise his discretion wisely in this case. *Hey's Case*, 338

10. Where a warrant in bankruptcy was issued July 10th, the first meeting of creditors being fixed for July 24th, and, on the 24th, the marshal made return of due publication of notice, the first publication being on July 15th, and of due mailing of notices on that day, and thereupon the register adjourned the meeting to August 8th, and directed a new notice to be given by the marshal, as required in the warrant, of such adjourned meeting, and, on August 8th, the marshal returned that he had, on July 29th, mailed notices to the creditors, but did not return that any further publication had been made,

*Held*, That the publication for the first day was not sufficient, the meaning of the eleventh section of the Bankruptcy Act being, that the notices shall be served, and the publication be completed, before the commencement of the ten days immediately preceding the return day of the warrant.

That, there having been no proper publication and service of notice, it was proper for the register to adjourn the meeting.

That the word "given" in the twelfth section of the Act, means *published* as well as *served*.

That, as the notice had not been properly published at the time of the second meeting, it was proper for the register to again adjourn the meeting and direct notice to be published as above stated, the service on the creditors having been properly made and standing good.

That, if the publication had been good for the first return day, it would not have been necessary to publish again, but only to have required new service of the notices on the creditors. *Devlin & Hagan's Case*, 335

11. Whether in proceedings in involuntary bankruptcy, a jury can be demanded on any day but the return day—*quere*.

By consent of parties, an adjourned day may be held to be the same as the return day. *Pupke's Case*, 342

12. Under the twenty-sixth section of the Bankruptcy Act, a bankrupt may, notwithstanding the pendency of pro-

ceedings in bankruptcy by or against him, be held under arrest in a civil action, if it is founded on a debt or claim from which his discharge in bankruptcy would not release him.

Under that Act, no debt created by the defalcation of a bankrupt, while acting in any fiduciary capacity, will be discharged.

The twenty-first section of the Bankruptcy Act does not apply to any suit brought to collect or enforce or satisfy any debt which would not be discharged by a discharge under the Act.

The twenty-seventh rule of the General Orders in Bankruptcy applies only to the court in which the bankruptcy proceedings are pending. *Seymour's Case*, 348

13. Where R., a merchant in New York deposited goods with S., a merchant in New Orleans, for sale on commission, and S. sold them, but made no returns,

*Held*, That the debt contracted by S. was contracted by his defalcation while acting in a fiduciary capacity, and that it was, therefore, a debt, which, under the thirty-third section of the Bankruptcy Act, would not be released by his discharge in bankruptcy. *id.*

14. Where petitions were filed in involuntary bankruptcy, and injunctions were issued to prevent the sale of the debtor's property on execution, the facts on which the injunctions were issued being the very acts of bankruptcy alleged, and the bankrupts had taken issue and demanded a jury and motions were made to set aside the injunctions on the merits,

*Held*, That the court would not, on a motion on affidavit, dispose of the issues which were involved in the proceedings.

That, if the property was perishable, that was no ground for dissolving the injunctions.

That the court had no power to sell the property, as perishable, at this stage of the proceedings, unless it was in the possession of the messenger, *Mazler & Couperthwaite's Case*, 356

15. Where the bankrupt objected to the proof of debt of a creditor, and re-

quested the register to allow the creditor to vote for assignee, only in respect of a portion of his claim, because (1) Interest was included to make up the amount; and (2) Part of the claim was on a draft given on a purchase of lumber by the bankrupt, which was never delivered by the creditor, so that the consideration of the draft entirely failed, and the bankrupt was also entitled to damages, which should be set off against the rest of the creditor's claim, and his debt should only be allowed for the remainder; and where the bankrupt offered himself as a witness to prove his allegations, but the register refused to hear his evidence or to reduce the amount of the claim, and certified the question to the court,

*Held*, That, under the provisions of the nineteenth section of the Bankruptcy Act, if a debt is due from the bankrupt, so as to bear interest before the adjudication in bankruptcy, the amount of the debt to be proved is to be ascertained, by adding the interest until the day of the adjudication; and that if the debt becomes due and payable without interest, after the adjudication, its amount is to be ascertained by taking off interest from the day of adjudication until the day it will become payable.

That the register erred in refusing to receive evidence that the consideration for the draft had entirely failed.

That, as the claim on the draft was contested, the register ought, before going further, to investigate the question raised as to the consideration, with a view of postponing the proof of the claim if necessary, as required by the twenty-second section.

That the claim for damages on the contract for the purchase of lumber ought to have been stated in the bankrupt's schedule of property.

That that claim, being unliquidated, could not be applied as a set-off against any part of the creditor's claim, and must be wholly disregarded in the proceedings for the choice of an assignee. Whether, if put into the shape of a debt against the creditor, it would fall within the purview of § 20 of the Act—*quere?* *Ornd's Case*, 361

16. Where a petition in bankruptcy stated the present residences of certain creditors to be unknown, but gave their former residences,

*Held*, That the statement as to the present residence was sufficient; that the statement of the previous residence was surplusage, and that the bankrupt should show, either in the schedules attached to his petition or in a separate affidavit, what efforts he had made to find the present residence.

That the marshal's return to the warrant, though not conclusive, is sufficient to authorize the register to proceed, if it shows due service and publication.

That the marshal should copy into the notices the exact language used in the warrant, but that immaterial variances are to be disregarded by the register.

Registers in bankruptcy should certify to the court only questions which actually arise. *Pulver's Case*, 381

17. When no creditor who has proved his debt appears at the time and place appointed for the first meeting of creditors, the judge, or if there be no opposing interest, the register, is to appoint one or more assignees. *Cogswell's Case*, 388

18. Under § 4 of the Bankruptcy Act and rule 8 of the General Orders in Bankruptcy, a register in bankruptcy has power to make an order requiring an assignee in bankruptcy to file the account required by § 28 of the Act. If no assets have come to the hands of the assignee, form No. 35 is such account; but if assets have come to his hands, forms Nos. 37 and 38 constitute it.

It is not necessary for the bankrupt on presenting the petition, form No. 51, to produce the assignee's return, form No. 35, or any evidence other than the statement in the petition that no debts have been proved, or that no assets have come to the assignee's hands.

Publication "once a week for three successive weeks," means publication once in every seven days for three successive periods of seven days, so that the interval between any two of

the publications shall not be less than seven days, and the interval between the last publication and any proceeding dependent upon the publication shall not be less than seven days.

A register has power to make the order to show cause (form No. 51) there being no opposition, if, under § 4 of the Act, he is directed to make it by the judge; and the order referring the case to him may be considered as giving such direction.

Orders for the examination of bankrupts, or their wives or other witnesses, are summonses under § 26; and, under rule 2 of the General Orders, blanks of form No. 45 not filled up, but signed by the clerk and bearing the seal of the court may be given by the clerk to the registers. *Bellamy's Case*, 390

19. In proceedings in involuntary bankruptcy, the order to show cause having been served on only one of two debtors, and no notice having been published as to the other,

*Held*, That the appearance of the debtor not served need not be personal, but might be by attorney. *Weyhausen & Freytag's Case*, 397

20. Where a debt sought to be proved in bankruptcy is evidenced by a note, the note must be produced and exhibited when required by the register the assignee, or the bankrupt, on proper occasions. Not so, if a judgment has been recovered on it.

A proof of debt is not open to objection because it appears that the statute of limitations, if set up, would be a good defense to the claim. The statute of limitations, if relied on as a defense, must be set up affirmatively by a debtor. *Knoepfel's Case*, 398

21. On the adjudication of bankruptcy, the register is authorized and required to receive the surrender of the bankrupt's estate, and to keep the property safely, until it can be turned over to the assignee. *Hasbrouck's Case*, 402

22. Where an agent of a creditor, who had filed proof of the creditor's debt against the bankrupt, asked leave to withdraw the proof of debt, it being

alleged that certain facts had been by error omitted,

*Held*, That the proof of debt could not be withdrawn, but that the creditor ought to be allowed and required to amend his proof. *Lowerré's Case*, 406

23. A register should state to the judge any reasons which he may know to exist, why an assignee elected or appointed should not be approved. *Bliss' Case*, 408

24. Registers in bankruptcy are charged with the general supervision and care of cases referred to them.

If, at any stage of proceedings before him, a register determines that a bankrupt's schedules are insufficient, he may of his own motion order them to be amended.

Where the register makes an order that a bankrupt's schedule be amended, the order ought to specify particularly the respects in which it is to be amended.

It is necessary for a bankrupt to state in his schedules whether or not any note has been given, or any judgment rendered, for every debt, and whether or not any person is liable with the debtor, as a partner or joint contractor.

What is a sufficient statement of those facts is a matter of discretion with the register.

The use of dots or contractions, in the schedules, to indicate a repetition of words previously used, is forbidden by rule 14 of the General Orders in Bankruptcy. *Ornd's Case*, 420

25. On a petition, according to form No. 51, by a bankrupt for his discharge, the register to whom the case is referred may direct the making of the order to show cause contained in that form.

Whether there be opposition to the bankrupt's discharge or not, the register must furnish to the court, after the return day of the order to show cause, a certificate that he has examined carefully all the proceedings in the case, and that the bankrupt has in all things conformed to the requirements of the Act.

The bankrupt is made responsible

for the regularity of the proceedings, and is bound to see that all the necessary steps are regularly taken, or he cannot have his discharge.

The register is entitled to fees for the above services, under section forty-seven of the Act, as for services "while actually employed under a special order of the court."

No discharge can be granted until all the papers relating to the case are filed by the register in the clerk's office. *Bellamy's Case*, 426

26. A person named as a creditor in a bankrupt's schedule, but who does not appear in person or by attorney duly constituted, and has not proved any debt, cannot put on file a protest against being named as a creditor. *Altenheim's Case*, 431

27. Where creditors, before the first meeting of creditors, filed proof of their debt, and applied for an order for the examination of the bankrupt, and the bankrupt objected to the granting of the order, on the ground that it could not be made before the first meeting, and, after argument, the register granted the motion, whereupon the bankrupt moved that the question be adjourned into court for the decision of the Judge, under section four of the Bankruptcy Act, and the register declined to adjourn the question, but, on the bankrupt's request, certified the matter to the court,

*Held*, that the objection of the bankrupt to the granting of the order for the examination, raised an issue of law which it was the duty of the register to adjourn into court.

That, as the bankrupt argued the question before the register, he waived his right to have the question adjourned into court, and, after the decision of the question by the register, there was no issue of law to be adjourned, and the register was right in not adjourning the question under section four.

That creditors may prove their claims before the first meeting of creditors.

That a creditor who has proved his claim, may apply for an examination of the bankrupt before the first meeting of creditors.

That it is not the duty of the register to notify the bankrupt, or his attorney, of the filing of proof of any claim before the first meeting of creditors. *Patterson's Case*, 448

28. No notice need be given to the bankrupt of the examination of a witness called by the assignee in bankruptcy.

Such examination may be proceeded with without reference to an examination of the bankrupt, which is being had on the part of creditors. *Levy's Case*, 484

29. Form No. 4 in bankruptcy is not a special order, but a "general order," under rule 5 of the General Orders in Bankruptcy.

The special order, directed by the previous decision in this case to be made in every case in bankruptcy, is necessary.

The clerk must mail the notices, form No. 52.

The order, form No. 51, though the register is to direct it to be issued, is to have the signature of the clerk and the seal of the court.

When a register directs that order to issue, he is at once to transmit to the clerk a list of all the proofs of debt in the case, which have been furnished to the register or the assignee, containing the names, residences, and post-office addresses of the creditors, with particularity enough to enable the notices, form No. 52, to be served properly. *Bellamy's Case*, 474

30. Under section twenty-six of the Bankruptcy Act and General Order No. 10, a bankrupt is to be examined and cross-examined like any other witness.

The exclusion by a register of a question in an examination before him, which is objected to, is not raising an issue of law within section four of the Bankruptcy Act, nor does objecting to the question raise such an issue of law.

A register has no right to pass upon the competency, materiality, or relevancy of a question.

The practice in taking depositions before a register is the established practice in examinations before an examiner in Chancery.

When a register adjourns a question

into court under section four of the Act, it is not necessary to adjourn further proceedings in the matter until the question shall be decided by the judge.

As to the interpretation of the provision in section six of the Act with reference to certificates—*quere*.

A certificate by a register stating a question objected to, and that he excluded the question, is not a "special case" under section six. *Levy's Case*, 496

31. When a petition in bankruptcy is filed, which is followed by an adjudication of bankruptcy, the time of the filing of the petition is the commencement of proceedings in bankruptcy, and the assignment, when made, relates to that date.

The fact that amendments to the petition or the schedules attached are afterwards, by order of the register, filed before the adjudication, does not affect the date to which the assignment relates.

If no adjudication in bankruptcy is made upon a petition, no proceedings are commenced, so as to affect the title to the debtor's property, or to give a creditor any right against the debtor as a bankrupt, or against his property, except such as are provided by section forty.

The words "may be issued" in section thirty-eight of the Bankruptcy Act, are to be read, "shall be issued."

The adjudication of bankruptcy in a voluntary case ought not to be postponed until the register has, in accordance with General Order No. 7 and rule 4 of this court, certified the petition and schedules to be correct.

The words "adjudication of bankruptcy," in sections fourteen and nineteen of the Act, mean the commencement of the proceedings, according to section thirty-eight.

The register is the proper judge of the propriety of allowing a bankrupt, who is under examination, the privilege of consulting with his counsel, provided that such consultation does not cause delay in the proceedings; and the court will not interfere with the exercise of such discretion, in ordinary cases. *Patterson's Case*, 508

32. Where creditors of a bankrupt had



adopted a resolution appointing trustees under section forty-three of the Bankruptcy Act, the confirmation of which was opposed.

*Held*, That the parties desiring the confirmation of the resolution were the moving parties, and should serve their papers on the opposing parties that they might answer them. *American Water Proof Cloth Co.'s Case*,

526

33. Where judgments were obtained in good faith against a bankrupt, and levies, on executions issued under them, were made prior to the filing of his petition in bankruptcy, after which injunctions were granted by the Bankruptcy Court, which, after the lapse of several months, the creditors moved to dissolve, the assignee in bankruptcy having taken no steps in the matter,

*Held*, That as it did not appear that the property levied upon was worth more than the amount of the judgments, nor that a sale by the assignee would realize any more than a sale by the sheriff, and as there was no proof that any advantage would result to any creditor by continuing the injunction, it must be dissolved.

That the rights acquired by the judgment creditors by their levy must be preserved to them.

Whether the Bankruptcy Court has power to assume possession and control of property levied on by a sheriff prior to the proceedings in bankruptcy—*quere*. *Wilbur's Case*,

527

34. If a creditor opposing a bankrupt's discharge would have a trial under section thirty-one of the Bankruptcy Act, his specification of objections must be sufficiently definite to enable the court to see that there exists a fair question of fact, necessary to be determined upon evidence outside of the papers, before the discharge can be granted. *Waggoner's Case*, 532

35. An order, directing that the fees and costs in a bankruptcy case shall not exceed the amount of the bankrupt's deposit, should only be made after a personal examination of the bankrupt. *Redfield's Case*,

535

36. When the discharge of a bankrupt is applied for after sixty days from the adjudication, the notice, form No. 52, need be served only on the creditors who have proved their debts, even though it contains a notice of the second and third general meetings of creditors.

It is not necessary, in such case, that the request of the assignee, form No. 28, should be furnished to the register. *MacIntire's Case*,

543

37. A bankrupt under examination, in October, 1867, in proceedings commenced in June, 1867, having stated what amount of property he had a year before that time, was asked, "Have you lost any part of it in gaming?"

*Held*, That the question, being broad enough to cover the time subsequent to the commencement of his proceedings in bankruptcy, was improper, as calling on him for an answer which might subject him to punishment for a criminal offense, under section forty-four of the Bankruptcy Act. *Patterson's Case*,

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## SALVAGE.

1. Where a vessel fell in, off Cape Hellen, with a wreck, which, on being boarded, proved to be a derelict, and the master put on board her a crew, consisting of his mate and cook and two men, who were being carried to New York at the expense of the owner of the salvor vessel, who brought her in safety to New York, the value of the vessel and cargo being \$3,700,

*Held*, That the spirit of the rule which governs salvage awards, requires that while they should not be extravagant, they should always be generous.

That the rule in cases of derelict is to award a moiety, the burden being on the claimant to show that a different measure should be applied.

That the rule allowing compensation to the owners of the salvaging vessel is too firmly established to be

shaken, and the habit of Courts of Admiralty is to award them a third.

That the responsibility thrown upon the master and his rank are to be considered in fixing the share to be paid to him.

That a passenger who was bold in advising the master to attempt the service, and active in helping to perform it, was entitled to an increased share on that account.

That passengers who refused to volunteer to assist when solicited, are not entitled to share in the award.

That there should be but one libel filed in ordinary salvage cases, and costs paid for but one.

That part of the costs might be paid out of the remaining share of the proceeds, but that there were no circumstances which called for an award of a counsel fee.

Ordered that the clerk's and proctor's fees be first paid out of the fund, and that half the remainder be divided into twenty-five shares, of which the owners were to have seven, the master five, and the passenger three. The remainder to be divided among the crew and the other passenger according to their wages. The passenger to rank with the mate. Marshal's fees and commissioner's costs to be paid out of the remaining proceeds. *The Charles Henry and Cargo*, 8

2. Where a libel was filed by passengers on the Steamship Merrimac, to recover for alleged salvage services, while on a voyage from New Orleans, to which port the vessel returned; and the answer set up that a suit was commenced in New Orleans against the steamship in behalf of another steamer, the Morgan, which towed her up to the bar, to recover a salvage compensation for such services, and that the claimants had bonded the vessel in New Orleans, and the suit was still pending; and the answer claimed that the libellants should have joined in that suit, or filed their libel in New Orleans.

On exceptions by the libellants to this part of the answer,

*Held*, That the pendency of one action for salvage is no bar to another suit by other salvors, for other services during the same voyage.

That the suit in behalf of the Morgan is no bar to this suit by the passengers.

That the libellants cannot be held to have lost their claim by failing to file their libel in New Orleans, under the circumstances alleged in the answer.

The practice of bringing such suits even for different services, in different courts, is disapproved.

As to the hardship of compelling the claimants to bond here, after they have bonded her in New Orleans, their remedy is by motion. The court will, on application, always reduce bail to such an amount as shall be reasonable security for the claim. *The Merrimac*, 65

8. Where several wreckers were engaged by parties who had bought a wreck, to assist in saving the materials, and libelled the property saved to recover salvage compensation, the claimants insisting that the work was done under an agreement for a stipulated price, made with Dominy, one of the libellants, whose special authorization to make the agreement was disputed:

*Held*, That in a conflict of positive statements, the surrounding circumstances become of great importance, and that under the circumstances the agreement for a stipulated price must be held to have been made.

That even if there was no formal authorization of Dominy to make such an agreement for all the libellants, the evidence showed that he was the head and spokesman of the libellants, and they must have been cognizant that some agreement had been made by him, and must be deemed to have acquiesced in it.

No tender of the amount remaining due of the stipulated price, nor any payment into court with a plea of tender having been made, the libellants are entitled to a decree for that amount with their costs. *The Anchors, etc. of the d'Alberti*, 77

4. In a case of derelict property, of small value, notice of the proceedings having been brought home to the owners of it, who failed to appear in the suit and had expressly abandoned the

property to the libellants, the court awarded the whole balance (\$107) to the salvors after payment of costs. *Two Anchors and Chains*, 80

5. A sloop laden with iron ore, went on a rock in Hell Gate, and was left by her master and crew. The sailors, however, watched her from the shore till she was carried off from the rock and floated towards the Bread and Cheese, a dangerous reef, when they put out in their boat to board her. A passenger steamboat on her way to Harlem also saw her position and went to her, and took her in tow before she reached the Bread and Cheese, and before the crew reached her, and towed her to Harlem; and the master of the steamboat, while negotiations were pending to settle the claim for salvage, filed a libel to enforce the claim.

*Held*, That the facts make out a clear case of salvage.

That the opinion of the crew of the sloop that they should have been able to save her if the steamboat had not gone to her aid, although to be taken into account in fixing the compensation, as indicating the extent of the risk, does not take the case out of the rules applicable to cases of salvage.

That the court, if it were not a case of salvage, might be inclined to withhold from the libellant his costs, because of his putting the claim in suit, while it was in a fair way to be settled; but that the same considerations of public policy which affect salvage awards are not overlooked in disposing of the question of costs.

On a valuation of \$1,500, the court allowed \$300 and costs. *The Joseph C. Griggs and her Cargo*, 81

6. Where a shipmaster who had gone on board a brig at Bermuda to come in her to New York, alleged that the master of the vessel proved incompetent, and that after being out twenty-three days, the provisions and water falling short, he took charge of the vessel and brought her into a port of Nova Scotia, contrary to the wishes of her master, and thereby saved her to her owners, and claimed salvage.

*Held*, That the facts alleged by the libellant as to the condition of the vessel were not sustained by the proof.

That whether the libellant did su-

persede the master or not, the facts of the case were not such as to warrant the court in giving him compensation for such action. No such extraordinary remedy was necessary under the circumstances shown. That the libellant's claim therefore, must be dismissed. *The Anastasia*, 166

7. Where a regiment of United States soldiers was being transported from New Orleans to New York upon a steamer, under a contract between the owners of the steamer and the government, and the vessel, having sprung a leak, was saved from sinking by the labor of the troops for four days and three nights in bailing the vessel, working under the command of the officers of the regiment, and continuing their labor after the vessel was brought so near shore that she might have been beached or the men landed in boats, and until, by the help of another steamer which came to her assistance, she was brought to the Mississippi bar and was thus saved from a total loss,

*Held*, That the relation of the troops to the ship was not that of passengers, and that they could recover salvage compensation for their services.

That, even if they had been passengers belonging to the ship by virtue of a passenger contract, the court might well award them salvage by reason of the services performed by them after the vessel was in sight of the beach and they could have escaped from her.

On a valuation of \$250,000 the court allowed \$20,500 salvage. *The Merrimac*, 201

8. Courts of Admiralty will not allow a salvor to take advantage of his situation and to avail himself of the calamities of others to drive a bargain; but they will enforce a contract made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain.

Under the circumstances of this case, an agreement to pay to a steamboat \$3,000 for towing a vessel worth \$8,000, with a cargo of sugar, for twenty-seven hours, was sustained by the court. *The J. G. Paint*, 545

9. Towing a steam vessel which has lost the use of her steam machinery by an accident, although she is sound in hull and masts, is a salvage service.

It is not necessary that the distress should be actual or immediate, or that the danger should be imminent or absolute. It is sufficient if, at the time when the service is rendered, the vessel has encountered any damage or misfortune which may possibly expose her to destruction if the service be not rendered.

Where a steamer, which had lost the use of her machinery, was towed by another steamer about sixty or sixty-five miles to Charleston, the latter losing by the service not over two or three hours of time, and the former saving three or four days, the vessel towing, with her cargo, being worth \$280,000, and the saved vessel and her cargo being worth \$100,000, the court awarded \$900 salvage. Of this \$900, \$400 was allotted to the owner of the saving vessel, and \$50 to her master, and the remaining \$450 was ordered to be divided among the officers and crew, including the master, in proportion to their wages. *The Saragossa*, 551

10. Where a steamer which had broken her machinery, so that it could not be used, but could have been made fit for use in a day or two, and which was making two and a half knots an hour under canvas, was towed by another steamer, for about thirty-four hours, to Fortress Monroe, and thence to Norfolk, where the salvor vessel was compelled to go for coal, and, at the time of their arrival at Fortress Monroe, it began to blow, and stormed so heavily that the latter was unable to go to sea till the second day after, and she then met with severe weather on her way to New York, by which she was somewhat injured and was also compelled to put back to Norfolk for more coal,

*Held*, That neither could the fact, that the salvor vessel was saved from exposure to storm by going into Fortress Monroe, be taken into consideration to diminish her compensation for the services she rendered, nor could the storms which she afterwards met, or the injury which they inflicted upon

her, be considered for the purpose of increasing that compensation.

The salvor vessel with her cargo and freight being worth \$434,000, and the vessel saved, with her cargo and freight, being worth \$100,000, and both carrying passengers, the Court awarded \$9,000 salvage.

This sum was distributed, one half to the owners of the salvor vessel, \$500 to her master, and the rest to her officers and crew, including the master, in proportion to their wages.

It is the policy of Courts of Admiralty to encourage salvage services by large, powerful, well equipped and valuable steamers, by giving their owners one-half of the compensation awarded. *The Saragossa*, 553

#### SEAMEN'S WAGES.

1. Where seamen had obtained a decree for their wages by default, and an application was made by one who had libelled the vessel for advances, to open the decree, and it appeared that the seamen had not been paid their wages, the application to open the decree was denied. *The Geo. Prescott*, 1

2. Admiralty courts allow a minor to recover in his own name wages earned in sea service, when the contract on which he sues was made personally with him, and it does not appear that he has any parent, or guardian, or tutor entitled to receive them.

A suit in admiralty brought to recover wages before the time allowed in the sixth section of the Act of 1790 has elapsed, is prematurely brought, and will be dismissed.

Where a seaman is discharged from a vessel, the discharge terminates the contract, and the provision in that section for ten days' delay after the delivery of the cargo is released, and the seaman may proceed at once for his wages. *The David Faust*, 183

3. Seamen shipped in Hamburg for a voyage to New York and back. In New York the vessel was sold by a decree of the court of admiralty for advances, and the purchaser discharged the seamen, who thereupon petitioned to have their wages, with

two months' extra pay, paid first out of the fund;

*Held*, That a sailor who was made second mate was entitled to a second mate's wages from the time of his appointment.

That a sailor shipped in New York, who rendered services on board in port only, was entitled to a lien for his wages.

That the Hamburg law was a part of the contract of these seamen, and that, by that code, when a vessel is prevented by higher power from completing the voyage, and the crew are discharged, they are entitled to a free passage home, or two months' extra pay.

That the sale of this vessel by decree of court was a "preventing by higher power," and that, as no free passage to Hamburg had been provided, the seamen were entitled to the two months' extra pay, and had a lien on the proceeds for it.

That a mate who had loaned money to the master, and taken from him an agreement, in place of interest, to divide all profit and loss, as if he were part owner, was only a mortgagee, and was entitled to recover his wages as mate.

That an increase of wages by the master in New York did not give the sailors a lien for such increase prior to that of creditors for advances to the vessel.

That the act of March 8d, 1843, fixing the value of the "mark," does not apply to its value for commercial purposes, and that such value is a matter of evidence.

That the amount decreed to the seamen must be the amount of their wages in Hamburg money, reduced into coined dollars of the United States, without adding anything by reason of the premium on gold. *The Blohm*, 228

4. Where a master and seamen had a decree for wages against the proceeds of vessel and freight, and a libel was filed against the vessel by one Patrick, who claimed to be entitled to her proceeds as mortgagee, but his title to the mortgage was contested,

*Held*, That the decree in favor of the seamen and the master must be

satisfied out of the general fund in court, leaving the question, whether that payment should be charged against the proceeds of the vessel or the freight, to be determined on the final hearing on Patrick's libel. *The Sailor Prince*, 481

6. Where a sailor deserted from a vessel, before the voyage for which he was shipped was completed, and never afterwards made any attempt to return to his duty,

*Held*, That he had forfeited his wages then due, irrespective of the statute of July 30th, 1790. *The Merimac*, 490

### TOWBOAT.

1. Where a canal boat was being towed by a steamtug at the end of a hawser, with two other boats, she being the middle one, through the Kills on the north shore of Staten Island, and brought up upon a single rock lying some two hundred feet from the end of a dock, the existence of such rock being proved not to be known to persons familiar with those waters, the tow at the time not being in line with the steamtug, but having sagged off inshore,

*Held*, That a steamtug is not a common carrier of the vessel she tows.

That even common carriers are not held responsible for running upon rocks not generally known, and a *fortiori* steamtugs would not be.

That even though this tow was not in line with the towboat, but had sagged off towards the land, it is immaterial whether this was chargeable to the canal boat or the towboat, for there was nothing to indicate that any danger would be incurred by the sagging of the tow. So long as it was kept at a safe distance from the shore and from all other known objects, there was no negligence in any one which can be held to be the cause of the accident.

That the facts make out a case of misfortune, where the loss must be borne by the vessel on which it fell. *The Angelina Corning*, 109

2. Where injury is done by or received by a vessel in tow of another, the inquiry, by which the responsibility of

either vessel is to be determined, should always be as to which party is the principal and which is the servant.

Where the tug was the principal, a vessel which collides with the vessel which she has in tow cannot charge the tug's negligence as a fault upon the vessel in tow. *The Alabama and The Gamecock.* 476

See SALVAGE, 7 and 8.

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### UNITED STATES PROPERTY.

Where a vessel under charter to the United States, whose owners were to victual and man her, took on board a load of property, captured by the army of the United States, to bring it to New York, and meeting with disaster on the voyage, her master took up money on a bottomry of the vessel and cargo, and on her arrival in New York a libel was filed to enforce the bottomry bond, and the vessel and cargo were seized by the marshal under the process, and no appearance

being entered for either vessel or cargo, the District Attorney of the United States, before the return of the process, applied on affidavit for an order directing the release of the property and vacating the process, on the ground that Government property was not subject to the process of the court;

*Held*, That whether the vessel could be considered as Government property under the charter was doubtful, and that such a question should not be disposed of before appearance, and on motion.

That though the cargo was Government property, it had been put by the Government into the custody of the master of the vessel, and it was doubtful whether granting the order would put the Government into possession of it.

That the law of the case ought to be determined upon a hearing on issues properly and formally framed, instead of upon motion. *The Othello and her Cargo.* 48

### VIS MAJOR.

See CHARTER PARTY.



















